Supreme Court, U. S.
FILED
SEP 21 1978
MICHAEL RODAK, JR., CLERK

No. 78-485

In the

# Supreme Court of the United States

OCTOBER TERM 1978

TEXAS COMMITTEE ON NATURAL RESOURCES,

*Petitioner,*

*v.*

BOB BERGLAND, SECRETARY OF AGRICULTURE OF THE UNITED STATES, *et al,*

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HARVEY L. DAVIS
ATTORNEY AT LAW
3315 Daniels Avenue
Dallas, Texas 75205

## INDEX


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| STATUTES INVOLVED | 3 |
| STATEMENT | 3 |
| REASONS FOR GRANTING WRIT | 8 |
| CONCLUSION | 21 |
| APPENDIX A | A-1 |
| APPENDIX B | B-1 |
| APPENDIX C | C-1 |
| APPENDIX D | D-1 |

Page

**Cases**

Kleppe v. Sierra Club, 427 U.S. 390 ..... 20, 21
Maresca v. U.S., 277 F. 727, cert. den. 257 U.S. 657 ..... 14
Sierra Club v. Butz, No. 71-2514, 9th Circ. (Unpub.) ..... 8, App. D
Sierra Club v. Hardin, 325 F. Supp. 99 ..... 8
Sierra Club v. Morton, 510 F.2d 813 (Fifth Circ. 1975) ..... 18
United States v. Greathouse, 166 U.S. 601 ..... 13

**Statutes**

Multiple Use-Sustained Yield Act of 1960 (16 U.S.C.)
Sections 528, 529, 531 ..... 3, 5, 8, 10, 11, 19, 21
Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C.), Sections 1600-1610 (Includes the following Act) ..... 4, 12
National Forest Management Act of 1976 (16 U.S.C.)
Section 1604(c) ..... 12, 13, 14, 16, 17
Section 1604(g) (same as Sec. 6) ..... 7, 8, 10, 11, 13, 15
National Environmental Policy Act of 1969
Section 4331 ..... 16, 17, 19
Section 4332 [same as Sec. 102(c)] ..... 6, 8, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21
Section 4335 ..... 13

**Miscellaneous**

Forest Service Draft Regulations under NFMA (16 U.S.C.) 36 CFR 39054-5 ..... 11
Council on Environmental Quality Guidelines (40 CFR)
Sec. 1500.5 ..... 18
Sec. 1500.8 ..... 18
Congressional Record
S-14507, Aug. 25, 1976 ..... 14
H 11843, Sept. 30, 1976 ..... 15

No. .....

---

In the

# Supreme Court of the United States

OCTOBER TERM 1978

---

TEXAS COMMITTEE ON NATURAL RESOURCES,

*Petitioner,*

*v.*

BOB BERGLAND, SECRETARY OF AGRICULTURE OF THE UNITED STATES, *et al,*

*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Texas Committee on Natural Resources, prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on May 8, 1978.

## OPINIONS BELOW

The opinion of the United States District Court (set out in Appendix A, infra) is reported at 433 F. Supp. 1235. The opinion of the United States Court of Appeals (set out in Appendix B, infra) is reported at 573 F. 2d 201.

## JURISDICTION

Judgment of the United States Court of Appeals was entered on May 8, 1978. The petition for rehearing and for rehearing en banc was denied on June 22, 1978. The jurisdiction of this court is invoked under 28 U.S.C., Sec. 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

1. Whether clear-cutting of all acreage available for timber management in the national forests of Texas is in violation of the Multiple Use-Sustained Yield Act of 1960?

2. Whether the National Forest Management Act of 1976 expresses or implies a Congressional intention to permit massive clear-cutting in the national forests and to suspend the requirement of an environmental impact statement under the National Environmental Policy Act of 1969, during the 9 year interim period granted to prepare the final guidelines for national forest harvesting?

3. Whether the Forest Service Environmental Impact Statement for the Conroe Unit is adequate although it failed to discuss the impacts of massive clear-cutting and failed to compare them with the impacts of selective harvesting?

4. Whether the failure of the Forest Service to file an adequate environmental impact statement justified the District Court in enjoining it from further clear-cutting until it filed such an environmental impact statement?

5. Whether the decision and judgment below incorrectly applied *Kleppe v. Sierra Club* in barring the environmental impact statement specified by the Trial Court?

6. Whether a declaratory judgment should be granted finding that massive clear-cutting violates the Multiple Use-Sustained Yield Act and the National Environmental Policy Act?



## STATUTES INVOLVED

The statutory provisions involved are:

National Environmental Policy Act, 83 Stat. 852, § 101(a), 42 U. S.C. § 4331 (a); § 101 (b); 42 U.S.C. § 4331 (b); § 102, 42 U.S.C. § 4332. (Hereinafter "NEPA")

National Forest Management Act of 1976, 90 Stat, 2949, 16 U.S.C. 1600 *et seq.*, § 6(c), 16 U.S.C. § 1604(c). (Hereinafter "NFMA")

Multiple Use-Sustained Yield Act, 74 Stat. 215, 16 U.S.C. 528-531. (Hereinafter "MUSY")

These statutes are printed in Appendix "C".

## STATEMENT OF THE CASE

("A" refers to the Appendix filed in the Court of Appeals. "TR" refers to the Transcript of Testimony. "TR-PH" refers to the Transcript of Testimony in the Preliminary Hearing.)

Petitioner brought this action for declaratory judgment and to enjoin the United States Forest Service from its massive, wholesale clear-cutting program in the Texas national forests in violation of the Multiple Use-Sustained Yield Act of 1960 and the Environmental Policy Act of 1970. A number of timber companies and the Texas Forestry Association intervened.

There are four national forests in Texas, all located quite close to each other in the extreme eastern part of the State. They are managed under the same practices by one forest supervisor. (A 154-155, 190 ff, Tr. 48)

When Petitioners filed this suit on July 2, 1976, the Forest Service was admittedly engaged in a program of clear-cutting *all* 556,458 acres available for timber management practices and converting 524,281 of these acres to pine. (A 124-125,

190-192)[1] The Service had begun this practice in 1964, had already clear-cut about 12 percent of the four national forests, and was proceeding at a rate of about one percent a year. (A 129)

Clear-cutting each unit means removing marked trees and then cutting everything else to the ground, except for an occasional tree left in some units for "wildlife." (TR-PH 70-73, 120, 140) Seed tree cutting is a variety of clear-cutting. NFMA Sec. 1604(g)(3)(F). It requires one extra stage.

This program was reduced to writing as early as January 25, 1971. (P's Exh 8, TR-PH 190-193) For a small portion of the national forests in Texas, the program was incorporated in the only ten-year plan which the Forest Service prepared under the Forest and Rangeland Renewable Resources Planning Act of 1974. 16 U.S.C. §§ 1600ff. (A 1738)

Petitioners refer to such total, indiscriminate clear-cutting as massive clear-cutting, to distinguish it from the occasional prescription of certain stands for clear-cutting as an aid to silviculture. In its massive clear-cutting program, the Forest Service has its teams go through the formalities of assessing each timber stand, but always winds up clear-cutting, or thinning as a prelude to clear-cutting. (TR. 452) Massive clear-cutting has been the gravamen of this case from its inception. (A62-63)

The classic alternative to massive clear-cutting is selective harvesting (Tr. 2405), in which the forester marks for harvest or for culling only a small percentage of the trees

1. Environmental Impact Statement and Unit Plan for Conroe Unit, which refers only to intermediate cuts and clear-cuts, under the proposed even-aged timber management program. (A 1738, page 57) See also, footnote 6.



on a site, so that many remaining good trees will continue to grow toward the next harvest, repeating the process perpetually, while at least maintaining the quality of the timber and keeping the forest available for multiple-use.

In both systems, there are intermediate thinnings, to reduce over-crowding, and often to provide poles or pulp.

All national forests "shall be administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes. 16 U.S.C. § 528. (The Multiple Use-Sustained Yield Act of 1960)

Despite MUSY, the Forest Service in Texas, in 1964, initiated its massive clear-cutting program. (A 122, 154-155, 193 insert, 524-545) Under this system, the Forest Service, after the sale of intermediate thinning cuts in each unit, marks sawtimber for clear-cut sale. The purchaser, using heavy equipment, removes all of the marked trees for lumber or other industrial purposes. The battered residue of hardwoods, undesired pines, and native shrubs and flowers is leveled (A 1064, 1788, TR-PH 27-30) or poisoned, and then burned (TR 53), creating a bare field for about a year.[2] The Forest Service then fosters a new crop of trees of a single species, (A 1065) systematically eliminating as many as possible of the other species which manage to hang on. (A 193-194) The Forest Service utilizes this system broadly through the nation, changing mixed forests to southern pines in the south and to a different selected species in a different locale. (TR. 575, 577, 579) It calls the system "even-aged management", as contrasted with selective harvesting, which it calls "all-aged". (A 386)

2. Sometimes the Service prescribes a slightly different variety of clear-cutting: up to five pine trees per acre are left standing as seed trees until a crop of pine seedlings is started, after which the seed trees are promptly harvested.

In spite of NEPA, the Forest Service in Texas filed no environmental impact statement on its Texas timber management program until after this litigation was begun on July 2, 1976. The Forest Service never filed any environmental impact statement on individual timber sales nor overall clear-cutting practices. On July 23, 1976, the same day the District Court entered the preliminary injunction in this case, the Forest Service filed the "Conroe Unit Environmental Impact Statement and Unit Plan," covering only a portion of the Sam Houston National Forest. That plan scarcely discussed clear-cutting (except for one sentence under "definitions"). It failed to reflect the massive clear-cutting program in which they were engaged. The clear-cutting program was proved indisputably in the preliminary and final trials of this case. (TR 45-48)

The eye-witness testimony of laymen, (A 193-197, 286-297, 307, 330-332) and the opinions of four experts, (A 201-209, 215-223, 309-310, 327), (TR 117-135, 233-255, 435-441, 583-597) showed that massive clear-cutting is not compatible with most forms of forest recreation, with natural wildlife populations, and with prevention of erosion. It is a transformation from multiple use to single use: timber production.

The Trial Court made findings of fact accordingly. (A 126-128)

The Court found the Conroe Unit Environmental Impact Statement to be inadequate in many specific respects. (A 135-136, 146-153) The Court, under NEPA, enjoined further use of clear-cutting in the Texas national forests until an adequate environmental impact statement is filed. The Court exempted certain pending clear-cut sales from the clear-cutting injunction, and did not prohibit the Forest Service from making selective harvesting sales. (A 118, 162)



However, the Court declined to make a conclusion of law on multiple use until the Secretary of Agriculture, through new regulations required under NFMA, might correct the clear-cutting excesses during preparation of the required environmental impact statement, (A 158) as to which the court retained jurisdiction. (A 159)

On appeal the Federal Appellants did not challenge the basic findings and conclusions of law supporting the District Court's judgment. They recognized that the Forest Service had the burden to prepare one or more environmental impact statements, and acknowledged the Trial Court's finding that the Forest Service had not yet filed any environmental impact statement which adequately addressed those concerns. (Federal Appellants Brief 16) Federal Appellants asked that they be permitted to continue the existing clear-cutting program while continuing to prepare environmental impact statements.

The Intervenor Appellants attacked almost every aspect of the District Court's decision and judgment.

In the Brief of Plaintiff-Appellee (p. 7) in the Court of Appeals, Plaintiff requested that in the event of reversal, The Trial Court be instructed to act on Plaintiff's multiple-use claim. The Court of Appeals did not discuss the point.

The Court of Appeals reversed the District Court and dissolved the injunction, holding that the Forest Service was entitled to pursue clear-cutting in national forests under "Church guidelines until guidelines under the National Forest Management Act become applicable."

Justice Goldberg concurred in part with the opinion and dissented in part. His dissent was based upon the failure of the majority to give sufficient weight to the explicit com-

mand in NEPA that *"to the fullest extent possible:* (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policy set forth in this chapter * * *" (Emphasis as in his opinion).

Justice Goldberg pointed out that NFMA underlines the desirability of an environmental impact statement to assist in evaluating the compatibility of particular clear-cutting programs with Congressional guidelines.

## REASONS FOR GRANTING THE WRIT

1. *The writ should be granted to consider the question of whether the Forest Service's massive clear-cutting program is incompatible with multiple use as required by MUSY.*

This is an important question of Federal law which has not been, but should be settled by this Court. MUSY is the five commandments of national forestry. The Supreme Court has never ruled on MUSY.[3]

By its systematic program of clear-cutting virtually all merchantable timber in the national forests of Texas and

3. Only one Court of Appeals has approached the current issue. See *Sierra Club v. Hardin*, 325 F. Supp. 99, 123 (D. Alaska 1971) to the effect that in order to comply with MUSY all the Forest Service must do is to *consider* all five statutorily required uses. In an unpublished opinion (Appendix D), the U.S. Court of Appeals for the Ninth Circuit modified that trial court decision. *Sierra Club v. Earl L. Butz*, No. 71-2514, 9th Cir., March 16, 1973. The latter decision states:

> "For the purposes of this order we accept this interpretation, with the caution that 'due consideration' to us requires that the values in question be informedly and rationally taken into balance. The requirement can hardly be satisfied by a showing of knowledge of the consequences and a decision to ignore them."



planting almost all clear-cuts to pine, the Forest Service is violating the concept of multiple use. The Forest Service is sacrificing recreation, wildlife, and watershed protection on the altar of timber production.

Massive clear-cutting in Texas desolates a site. Then the growth of brush and briars make the place impenetrable without a machete. Numbers of sprouts and weed species spring up, the same as those in every other clear-cut, federal and private. Even deer and squirrels can find, there, no acorns and nuts to carry them over the winter. Finally, the planted pine seedlings, aided by prescribed burns, assume total dominance, completing the succession to what two experts described as a "biological desert", and another as a "monoculture", still useless to human beings for most forms of unintensive recreation and to most forest creatures for habitat. (A 193-197, 201, 297, 306-308, 309, 327) It is worse than the clear-cuts of the Nineteenth Century. Then, the original species were able to come back. Now, the foresters destroy the ecosystem.

Total "even-age management", as the Forest Service euphemizes this process, has similar harmful effects throughout the South, and, to various extents, throughout the nation. (TR. 575, 577, 579, 593, 598) The evidence is overwhelming that the clear-cutting program being implemented by the Forest Service in the national forests of Texas and elsewhere is a major federal action significantly affecting the environment.

If the Supreme Court rules that the lower court should make conclusions on multiple use in this case, its decision will affect multiple use in national forests throughout the fifty states.

Since most of the forest products corporations have also converted the lands they own to single species tree farms, the cumulative effect of applying this process to national forests is devastating to natural forest ecosystems. The combined private and federal foresters are decimating the hardwoods and all species that live under hardwood or hardwood-pine forests.

The national forests, along with our other federal lands which are being clear-cut, comprise our principal remaining stands of diversified forests. Only a small fraction of these lands are qualified to be protected under the Wilderness Act. The much smaller national park system and state and private preserves also contain natural forests; but, with our growing population, we are already over-using many of these choice tracts. Congress, in requiring multiple use, recognized that we also need room in our national forests for dispersed recreation by our growing population of human beings and for sustenance of our dwindling populations of truly wild animals and plants. By massive clear-cutting, the Forest Service is drastically reducing such recreation and sustenance.

This cannot be the intent of NFMA. In twelve places, NFMA reaffirms the sanctity of multiple use.[4]

There is little likelihood that the Forest Service, on its own, will withdraw from its intrusions into multiple use unless the Courts so direct, at least by declaratory judgment. MUSY, like NEPA, is absolutely dependent on judicial enforcement. The Forest Service was already violating MUSY before NFMA. It continues to insist, after NFMA,

4. Secs. 1600(3), 1602, 1604(e)(1) and (2), 1604(g), 1607, re MUSY. See also Secs. 1600(5), 1601(d)(1), 1602(5)(A), 1604(g)(F)(v), 1611, re the principle of multiple use.



that its massive clear-cutting is in compliance with Multiple-Use. Its proposed regulations under NFMA deal only with individual sites. The regulations, in spite of Petitioner's efforts to provide input, do not prohibit massive clear-cutting.[5]

Limitations upon size and shape of individual clear-cuts do not confront the fact that all the available timber stands are being clear-cut once each rotation period, generally seventy years. Under this massive program, whether the sale units are large or small, they eventually adjoin each other, side by side, one solid composite of single-age stands, mostly of one species, throughout the national forest.

In the proposed regulations, even the size and shape limits contain escape clauses.

The only way to require the Forest Service to comply with MUSY is to grant this petition and to effectuate a ruling on clear-cutting versus multiple use.

2. *The writ should be granted to review the question of whether Congress intended in NFMA to suspend the requirement of an environmental impact statement under NEPA and to permit a program of massive clear-cutting of the national forests during the 9-year interim period granted to implement the final guidelines for national forest harvesting.*

*This is an important question of Federal law which has not been, but should be, settled by this Court.*

NFMA is the most significant national forestry legislation of this decade. Prior to this case, it has never before been subjected to judicial analysis. The basic holding of the

5. 36CFR 39054-5, August 31, 1978.

Court below seems to be that the legislative history of NFMA indicates a Congressional intention that clear-cutting be permitted in the national forests during an interim period *without the need of an environmental impact statement* called for by NEPA. This constitutes a serious misconstruction of NFMA.

Petitioner will show that (a) NFMA does not express nor imply any suspension of NEPA, and there is no need for construction, (b) if construction is necessary, the legislative history of NFMA clearly rejects any intention to suspend NEPA, and (c) the reasons stated in the majority opinion for a suspension of NEPA are unsound.

(a) NFMA Does Not Express or Imply Suspension of NEPA.

Nowhere does NFMA speak of suspending or repealing NEPA, temporarily or permanently. On the contrary, NFMA reaffirms NEPA.

In Sec. 1604(c) of NFMA, Congress set up a flexible timetable for incorporating these guidelines into unit plans, and added:

> "Until such time as a unit of the National Forest System is managed under plans developed in accordance with this chapter, the management of such unit may continue under existing land and resource management plans."[6]

6. The "existing" plans for "a unit", to which Sec. 1604(c) refers are those unit plans which were required by the Forest and Rangeland Renewable Resources Planning Act of 1974, which became a part of "this chapter" (Chapter 36), bearing the same section numbers as NFMA, 16 U.S.C. §§ 1600-1610. In Texas, at the time of enactment of NFMA, only one such plan existed, the Conroe Unit Plan (A 1738ff), affecting only about one eighth of the national forests of Texas. Such a unit plan covers a wide variety of subjects, and scarcely touches upon clear-cutting, much less, massive clear-cutting.



The Court of Appeals, in effect, added to the latter sentence the following clause:

> ". . . without the necessity for compliance with NEPA."

This construction ignores other provisions in the same law and in NEPA, and draws an unnecessary and untenable inference.

Sec. 1604(g)(1) of NFMA specifically requires the application of NEPA in the preparation of unit plans.

Sec. 4335 of NEPA recites:

> "The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies."

NEPA adds to, rather than conflicts with, other federal statutes. *Environmental Law*, p. 699, Hornbook Series (Feb. 1977). Therefore NEPA is supplementary to NFMA, and need not be suspended in order for the Forest Service to continue its operations.

When interpreted in the light of these other statutory provisions, the language of Sec. 1604(c) does not lend itself to the inference of suspension of NEPA. If Congress had intended to suspend NEPA, it could have so stated. A more likely interpretation of the "existing plans" clause is a legislative assurance that the agency does not have to cease operations while working out new unit plans.

Repeal by implication is not favored by the law. When two statutes are not absolutely irreconcileable, effect should be given, if possible, to both of them.[7]

7. *U.S. v. Greathouse*, 166 US 601, 17 S Ct. 701, 41 L ED 1130.

The same rule applies to suspension of a law as to repeal.[8]

Both the District Court and Court of Appeals herein found that NEPA and NFMA are not irreconcileable.

Under basic principles of statutory construction, the Court of Appeals should not have inferred an intention to suspend NEPA.

(b) The Legislative History of NFMA Rejects Any Intention to Suspend NEPA.

The Court of Appeals construction of Sec. 1604(c) is directly contrary to the intention of Congress as shown in the legislative history of NFMA.

Senator Hubert Humphrey, the author of the Act, said in floor debate that Section 1604(g) is not designed to override NEPA in any way.

> "Mr. BUMPERS. If I may, amendment 2209[9] is not designated to override NEPA in any way?
>
> Mr. HUMPHREY. Absolutely not. To the contrary, I appreciate the Senator's concern."[10]

The Conference Committee Report says:

> "Environmental Impact Statement
>
> The Conferees understand that paragraph (4), which requires that the regulations specify procedures to insure that plans are prepared in accordance with NEPA, makes no change in the responsibilities of the Secretary under that statute but is designed to establish uniform guidance within the Department of Agriculture as to what constitutes a major federal action for which an environmental impact statement is required."[11]

8. *Maresca v. U.S.*, CANY, 277 F 727, cert. den. 42 S Ct. 183, 257 US 657, 66 L Ed 420.
9. Amendment 2209 was the predecessor to Sec. 1604(g). See Congressional record, August 25, 1976, S 14507.
10. Congressional Record, August 25, 1976, S 14507.



The majority opinion, below, ignores the above quotations, and concentrates on discussion of the "Church guidelines." These do not address massive clear-cutting as proven in this case; much less do they address any suspension of NEPA.

(c) The Reasons of the Majority for a Suspension of NEPA Are Unsound.

Under the rule of no implication of suspension unless necessary, Petitioner is not required to show any more on this point. Nevertheless, Petitioner strongly feels that an inference of no suspension is just as reasonable as, and actually is more reasonable than, an inference of Congressional intent to suspend NEPA.

In this respect, Petitioner refers to the dissenting opinion of Justice Goldberg, herein. As the dissent points out, the alleged consistency of a particular clear-cutting program with the "Church guidelines" does not eliminate the need for an environmental impact statement on that program.

These guidelines[12] set out only general restrictions on the use of clear-cutting. They address clear-cutting as one of the tools of a mixed harvesting program, rather than as the only tool. If a butcher tells an apprentice it is acceptable to use a meat-axe on occasion, that is quite different from telling him he can, or must, use the meat-axe exclusively of the various knives and cleavers at his disposal.

11. Congressional Reecord, September 30, 1976, H 11843.
12. NFMA, Section 6(g)(3)(F).

Since the "Church guidelines" did not confront the problem of massive clear-cutting, it would be unreasonable to infer that by enacting those guidelines, Congress intended to dispose of the NEPA requirement to consider the environmental impacts, even temporarily.

Since the injunction was lifted, the Forest Service's massive clear-cutting program, as proven in the trial of this case, is proceeding apace.[13] It is shattering forest recreation, decimating forest-type wildlife and hunting, eroding watersheds, reducing timber productivity, and destroying ecosystems as they flourished before disruption by man. The Service is doing all this without having prepared one or more environmental statements discussing the impacts of massive clear-cutting. This writ should be granted to determine whether Congress intended such results when it passed NFMA.

By massive clear-cutting, the Forest Service violates not only the environmental impact statement requirements of NEPA, but also the provisions of § 4331 (b) (4), stating that federal agencies have the responsibility to preserve "natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice."

In any event, the Forest Service, when Congress enacted NFMA, had only one existing plan under the Renewable Resource Program. That was the Conroe Unit Plan. Therefore, a suspension of NEPA as to existing unit plans would have no application to the bulk of the national forests in Texas. Thus, no matter which way the "existing plans"

13. As of Sept. 1, 1978, the Forest Service had advertised approximately 22 clear-cut sales in Texas since the Court of Appeals overruled the Petition for Rehearing on June 22, 1978.



clause is interpreted, the Court of Appeals erred in holding that NFMA freed all four national forests from the application of NEPA.

3. *The writ should be granted to review the question of whether the Forest Service Environmental Impact Statement for the Conroe Unit is adequate although it failed to discuss the impacts of massive clear-cutting and failed to compare them with the impacts of selective harvesting.*

In its Environmental Impact Statement and Unit Plan for the Conroe Unit, about half of Sam Houston National Forest, the Forest Service discussed few impacts of clear-cutting, much less the cumulative impacts of massive clear-cutting and the impacts of selective harvesting. (A1738, p. 57)

Several witnesses testified that by utilizing selective harvesting the Forest Service would cause less impairment to the environment than by ending each rotation with a clear-cut. (TR. 120-135, 234-248, 585-586) An expert for the Forest Service testified that selective harvesting is the classic harvesting practice of forestry, still used on 60% of its forests by at least one of the biggest timber companies in Texas, owning 500,000 acres. (TR. 2405-2406)

The trial court found the Conroe Statement to be inadequate for these and additional reasons. (A 135-136, 146-153)

Without discussing any of the foregoing evidence and conclusions, the Court of Appeals held the Conroe Statement to be adequate. The majority opinion explained that selective harvesting had been discussed orally in a meeting before the draft Statement was prepared.

NEPA requires that *each environmental impact statement* shall discuss, "to the greatest extent possible," the impacts which a project will have upon the environment, and also the impacts which alternatives will have.[14] These impacts include cumulative impacts of all projects having common effects.[15]

The Conroe Unit Environmental Impact Statement violates the Act by failing to discuss the impact of massive clear-cutting on recreation, wildlife, watershed, soil, fire, disease, or any other environmental factor, and failing to discuss the impacts of selective harvesting, and to compare the impacts of the two systems, so as to lay the basis for a considered judgment not only by the Forest Service and the other agencies which review the statement, but also by the public, as the law requires.[16]

Since the statement must be self-sustained,[17] it cannot be made adequate by unattached discussions at a meeting, especially not a meeting attended primarily by representatives of the industries and government agencies deriving financial or resource benefits from the programs involved.

Massive clear-cutting has cumulative effects on an entire forest and region far greater than each individual clear-cut.

14. NEPA, Sec. 102(C)(iii) and 102(D); Council on Environmental Quality Guidelines, 40 CFR 20554, Sec. 1500.8(a)(4); *Sierra Club v. Morton*, 510 F. 2d 813, 825 (Fifth Circ. 1975), stating:

> "This discussion-of-alternatives requirement is intended to *provide evidence* that those charged with making the decision have *actually considered* other methods of attaining the desired goal, and *to permit those removed from the decisionmaking process to evaluate and balance the factors on their own.*" (Emphasis supplied).

15. Council on Environmental Quality Guidelines, 40 CFR 20553, Secs. 1500.5(d)(1) and 1500.8(a)(1).
16. *Sierra Club v. Morton*, 150 F 2d 813, 820 (Fifth Circ. 1975).
17. Council on Environmental Quality Guidelines, 40 CFR 20554, Sec. 1500.8(b).



The environmental impact statement or statements on Texas clear-cutting, to be adequate, would have to discuss the cumulative impacts of the massive program in which the Forest Service is engaged. The Conroe Statement, herein, made not the slightest pretense of so doing.

It is important to the future of all the national forests that the Forest Service and the people be given the benefit of a judgment showing what considerations the Forest Service must make before it proceeds further with clear-cutting the people's forests.

4. *The writ should be granted to consider whether the failure of the Forest Service to file an adequate environmental impact statement justified the District Court in enjoining it from further clear-cutting until it files one or more such statements.*

The District Court found, on adequate facts, that the Forest Service had been arbitrary in failing to file any adequate environmental impact statement (A 146-147) and enjoined the Forest Service from further clear-cutting until it filed one. (A 161)

The Court of Appeals lifted the injunction. Even the dissenting opinion stated that no injunction is necessary.

That Court was under the impression that adequate guidelines would be implemented shortly to protect against abuses of clear-cutting. That impression is erroneous. But whatever the interim, the trial court, which heard the facts, was in the best position to determine whether an injunction would best bring about a prompt compliance with the laws which the Forest Service was avoiding.

In this case, the Forest Service had conducted its massive clear-cutting for twelve years in violation of MUSY and seven years in violation of NEPA. In that period, the Forest Service had clear-cut one per cent per year of the national forests. (A 129) In each additional year of clear-cutting,

another one percent or more of the national forests would succumb to single-species tree farming, including key representations of our national heritage.

In such a situation, the trial judge was justified in granting an injunction. The Supreme Court should restore that, or a similar, injunction with granting this writ.

5. *The writ should be granted to consider whether the decision and judgment below incorrectly applied Kleppe v. Sierra Club 427 U.S. 390 in barring the environmental impact statement specified by the Trial Court.*

It is undisputed that in this case the Forest Service is engaged in a regional massive clear-cutting program. No regional or statewide impact statements have been filed. Therefore the important operative facts discussed by this honorable court in *Kleppe* are so different that *Kleppe* was improperly relied upon as a bar to the kind of programmatic EIS specified by the District Court. The Forest Service has filed no adequate EIS at any level for eight years. The clear-cutting activities throughout the Texas national forests are interrelated. Therefore *Kleppe* would seem to require a region-wide EIS under the facts of this case.

The facts in this case align themselves on the opposite side of the situation in *Kleppe*. This Honorable Court in *Kleppe* stated:

> "that § 102(a) (c) may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time . . . Thus, *when several proposals* for coal-related actions *that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.* Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action." (Footnotes omitted; emphasis added.)
>
> *Id.* at 409-410.



Here the massive state-wide clear-cutting program is having a "cumulative or synergistic environmental impact upon a region." (Finding of Fact 20, A 124)

Since this is the first time *Kleppe* has been perverted, it is doubly important that the Supreme Court grant a writ herein.

6. *Whether a declaratory judgment should be granted finding that massive clear-cutting violates the Multiple Use-Sustained Yield Act and the National Environmental Policy Act.*

If, as the trial court and the minority on the Court of Appeals held, the Forest Service was violating the law by its massive clear-cutting program, without an environmental impact statement, it is important to effectuate justice that the courts so declare, before that program proceeds further. The court should so rule, regardless of whether or not an injunction is granted.

## CONCLUSION

For the foregoing reasons Certiorari should be granted.

Respectfully submitted,

HARVEY L. DAVIS
ATTORNEY AT LAW
3315 Daniels Avenue
Dallas, Texas 75205
*Counsel for Petitioners.*

## APPENDIX A

## TEXAS COMMITTEE ON NATURAL RESOURCES

v.

**Bob BERGLAND, Secretary of Agriculture of the United States, John R. McGuire, Chief, Forest Service of Department of Agriculture, John Courtenay, Forest Supervisor, Sam Houston National Forest, Forest Service of the Department of Agriculture, Individually and in their official capacity.**

**Civ. A. No. TY-76-268-CA.**

United States District Court,

E. D. Texas,

Tyler Division.

May 24, 1977.

### *FINDINGS OF FACT*

JUSTICE, District Judge.

1. Plaintiff in this civil action is the Texas Committee on Natural Resources, a voluntary organization supported by contributions from individual members. Various members of the plaintiff committee make use of the National Forests in Texas for recreational purposes.

2. The defendants include Bob Bergland, Secretary of Agriculture (who is automatically substituted as a defendant pursuant to Fed.R.Civ.P. 25(d), John McGuire, Chief, Forest Service, Department of Agriculture, and John Courtenay, Forest Supervisor, National Forests in Texas, who are responsible for management of the National Forests in Texas.

3. Intervenors in this action are the Texas Forestry Association; Oliver Brothers Lumber Co., Inc.; Champion International Inc.; Conroe Creosoting Co.; L. R. Davis; Leggett Lumber Co., Inc.; Louisiana-Pacific Corp.; Owens Illinois, Inc.; Southland Paper Mills, Inc.; Walker Brothers, Inc.; Williams Lumber Co., Inc.; Woodville Lumber Co.; A. A. Steely Lumber Co.; The Boettcher Land and Timber Co.; Giles Brothers Lumber Co.; Davis Pulpwood Co.; Bob Currie; and Jack Alexander, Inc.

4. The United States Forest Service manages approximately 662,313 acres of National Forest lands in East Texas, with headquarters in Lufkin, Angelina County, Texas. The National Forests in Texas are comprised of four separate forests, namely, the Sam Houston, Angelina, Sabine, and Davey Crockett National Forests.* They are administered by a single employee, known as a Forest Supervisor, through seven Ranger Districts, each headed by a Forest Service employee known as a District Ranger. The seven Ranger Districts are: Raven, San Jacinto, Yellowpine, Trinity, Neches, Angelina, and Tenaha.

5. Of the total of 662,313 acres in the National Forests of Texas, 50,251 acres are under water, 30,570 acres are reserved or protected, and 22,500 acres are for various reasons unavailable for timber management activities. Thus, a total of approximately 558,992 acres is left available for timber management purposes.

6. "Uneven-age management" is a forest management system which provides for an intermingling of trees ranging in age from seedlings or sprouts through maturity; thus, a full range of age classes is found on each acre of a stand.

* See map atached hereto entitled "The East Texas Forests", taken from R. PHELAN, TEXAS WILD 146 (1976) and reproduced with permission of the author.



Only the largest, oldest, and dead trees are harvested at annual or more frequent intervals. This is known as "selective harvesting".

7. Until 1964, the Service practiced selective harvesting of pines and hardwoods in Texas. Its foresters marked the dead, mature, and large trees for sale to private purchasers, who removed only those trees, leaving the younger trees to grow.

8. "Even-age management'' is a forest management system wherein a stand of timber (softwoods or hardwoods or a mixture) of uniformly-aged trees is cultivated and maintained through maturity. Trees in an even-age stand are generally of the same age, but not necessarily of the same size. As hereafter shown, harvest schedules include two or three intermediate thinnings, conducted at fifteen to twenty year intervals, with the final regeneration harvest method being clearcut, shelterwood, or seed tree.

9. In Texas, the United States Forest Service shifted its system of management and sales (other than "thinning sales") to clearcutting, including seed tree cutting, in 1964. Since then, this method has accounted for the large majority of all sawlog sales by the Service. Under this method, the Service selects "units" in which the merchantable pine types (and, in less than ten percent of the acreage, hardwood types) are marked for harvesting.

10. Each sale of timber from the National Forest is consummated through a formal sale contract. These sales of timber are conducted according to regulations issued by the Secretary of Agriculture, 36 CFR 221, and are in accordance with procedures and guidelines contained in the Forest Service Manual, a large compilation of guidelines, directives, and other information governing the internal operations of the Forest Service.

11. District Rangers are named as contract officers. Sale operations are inspected, on a current basis, by specially trained sale administration officers working for the District Ranger.

12. The Service advertises various units for bids by prospective purchasers, indicating its prescription of "clearcut", "seed tree cut" or "seed tree removal" on the Sale Area Map, an attachment to the Timber Sale Prospectus. Each contract has a life of one to three years, which is extendable.

13. Contract provisions require some specific measures of environmental protection in timber cutting, utilization, and removal. Thus, timber sale contracts contain such standard clauses as "CT 6.4 — *Conduct of Logging*", which provides that logging will be conducted only with animals, trucks, or rubber-tired tractors with a gross weight of 13,000 pounds or less, or a bulldozer of up to 15,000 pounds (without bulldozer blade). "CT 8.2-*Environmental Protection*" provides for sale termination upon determination of environmental damage. However, such contracts contain no provisions requiring the purchaser to protect or to spare the unmarked trees, or to pay for them in the event of damage or felling (except that certain trees and buffer zones are reserved as locations where red-cockaded woodpeckers have nesting holes).

14. The contracts generally include a requirement that the purchaser construct one or more roads from an existing road to the area of the newly sold timber. The contracts also contain penalties, including provisions for breach and cancellation.

15. Within the contractual period, the purchaser moves in heavy equipment and cuts and removes the marked trees, leaving the other trees and vegetation heavily damaged.



16. The harvesting operation is then completed by the Service. On most harvesting sites, the Service "clearcuts", using heavy equipment to slice or push down, to within two or three inches of the ground, any trees and vegetation remaining after the commercial cutting. At that point, the debris is either piled and burned or pushed into windrows. In some harvesting sites, the Service uses herbicides, in addition to heavy equipment, to kill the vegetation remaining after the commercial cutting. Generally, the action of the Service results in the conversion of the harvest site to a bare field.

17. After the clearcutting, the Service plants seeds or seedlings, generally slash, loblolly, or shortleaf pine. In clearcuts where hardwoods have prevailed, they are permitted to grow back from those roots which were not destroyed by the clearcutting equipment. This process is called "regeneration".

18. About seven to fifteen years after each regeneration, the Service "clears out" hardwoods, by such processes as "prescribed burning" or herbicide injection. Later, the Service marks some of the remaining young trees for a thinning sale. Following the marking, the purchaser fells and removes the marked trees by use of heavy equipment. This process may be repeated up to four times in the life of the stand. The remaining trees are subjected to additional prescribed burning, to eliminate hardwoods and understory vegetation. The Service plans that, at the end of the rotation, the remaining large trees, mostly pines, will be marked for sale and sold as sawlogs.

19. Once the clearcutting cycle is underway, it comes under the Service terminology of "even-age management."

20. As part of the current clearcut sequence, the Service now plans the following rotation periods: seventy years for

loblolly pine, eighty years for shortleaf pine, and one hundred years for hardwoods.

21. Defendants intend to continue this process of clearcut-regeneration until 524,281 acres of the commercial forest lands in the four National Forests are converted to pine and 23,177 acres to hardwoods. This proposal constitutes a major federal action, the cumulative or synergistic effects of which are likely significantly to affect the quality of the human environment in the East Texas region.

22. Under the clearcut sales contracts previously described, the Service and the purchasers and contractors, in combination (including all Intervenors except Texas Forestry Association), are mutually engaged in clearcutting in the National Forests of Texas, each performing an integral part of that operation.

23. The clearcutting of the National Forests in Texas is highly controversial; *i. e.*, a substantial dispute exists as to the environmental effects of even-age management.

24. Stands which the Service clearcut from 1964 to 1975 are now covered densely with pine trees ten to twenty feet in height, except for openings among the pines, where the main growth is in briars, sumac, sweetgum, and other species of low value for timber or for game. After clearing and thinning, these stands become virtual monocultures of the loblolly, shortleaf, or slash pine species, with the exception of some hardwood "stringers" that are located primarily, but not wholly, in the lowlands.

25. Clearcutting results in increased fire hazard, because fire hazard is a function of fuel moisture content. In a forest, the flammable material on the ground is relatively moist and slow to burn, because of shade from the tall trees and the moisture of transpiration held under the forest canopy,



where air is less free to move than where is no forest. When all the trees are removed over an extensive area, flammable material will be hotter and drier than under a forest canopy and will, therefore, burn more readily.

26. Clearcutting probably results in increased hazard from insects and diseases, because it creates stands of trees of the same age and frequently of the same species, and because most insects and diseases attack trees of a particular age or species. (It is theorized by respectable authority that the closer a stand approaches a monoculture, the more susceptible it is to attack by insects and disease, and the more likely it is that an attack will become epidemic.)

27. Clearcutting impairs the productivity of the land, because it causes accelerated erosion and loss of the all-important top soil. Erosion increases exponentially with increase in the size of openings created in the forest by logging, and with the proportion of timber cut.

28. Clearcutting impairs the productivity of the land, because it causes leaching of nutrients essential to tree growth.

29. Clearcutting impairs and reduces the amount of habitat essential to various species of wildlife. Some species require relatively mature trees for nesting and for food. Other species require dead or hollow trees for nesting. Still other species of wildlife require a combination of mature hardwood trees for acorns, nuts, and other mast, and young hardwoods for browse. As detailed above, clearcutting results in closed even-age stands a few years after regeneration, and these stands provide inferior food and shelter for such particular species of wildlife.

30. Clearcutting impairs the productivity of the land by reducing the number of species and, therefore, eliminating the wide range of benefits resulting from the subtle interdependencies characteristic of the natural forest.

31. Except for birdwatching, photography, and some forms of hunting, even-age management largely destroys the recreational values of the clearcut area for about thirty years.

32. Even-age management results in the liquidation of high quality timber while it is still in the period of greatest volume growth, which inevitably leads to a future scarcity of high quality wood.

33. The Forest Service Manual, Sections 2403.1 and 2471, requires that "methods of cutting and logging will preserve the residual living and growing timber, promote favorable conditions of waterflow * * *". Contrary to the Manual, even-age management, as practiced in the National Forests of Texas, does not promote the younger growth. Further, clearcutting, as practiced in the National Forests of Texas, does not preserve the residual and growing timber, reduce hazards of destructive agents, nor secure favorable conditions of waterflow, but produces contrary effects.

34. As practiced in the National Forests of Texas, clearcutting also damages the trunks, branches, and often the roots of living hardwood trees which are not yet large or physiologically mature (even though they are up to seventy and eighty years of age) but are, instead, classified as younger growth. It thereby prevents or seriously sets back such younger growth, and often causes its death.

35. Although proscribed from doing so by its Guidelines, the Service has clearcut on soils and slopes which are fragile and subject to major injury. The Service has adopted this course of action, because it assumes that clearcutting will give the greatest short-range dollar returns and the greatest unit output.

36. Further, in the National Forests of Texas, the Service follows the practice of selling timber to the very banks of



creeks. This practice results in increased erosion of the banks and increased siltation of creeks. As to Briar Creek in the Raven District, and likewise as to other streams, cutting to the edge will, in reasonable probability, severely impair or ruin the streams for recreation, fish, wildlife, and soil and water conservation purposes.

37. A minimum buffer zone of natural vegetation along each side of a stream necessary to protect the stream, whether permanent or intermittent, is sixty-six feet.

38. During the last ten year period, the sawtimber sales in the National Forests of Texas were 628.6 million board feet. The sawtimber growth for that period was 2,017.0 million board feet. The pulpwood sales were 259.2 million board feet, and the pulpwood growth was 997.0 million board feet. Less than one-third of the growth was harvested.

39. The annual regeneration in the National Forests in Texas over the last three years has been approximately 5,500 acres. On a percentage basis, approximately 0.98% of all land available for timber management purposes is regenerated annually.

40. On March 2, 1976, pursuant to the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. §§ 1601-1610), the Forest Service filed with the Council on Environmental Quality a document entitled, on its cover, "RPA, A Recommended Renewable Resource Program" (hereinafter called "RPA") The inside title page recites, "Final Environmental Statement and Renewable Resource Program, 1977 to 2020." The document of 800 pages is mainly a recitation of background and goals under the Forest and Rangeland Renewable Resources Planning Act of 1974. However, on pages 350-97, the section "Environmental Analysis" includes headings often contained in environmental impact

statements. Within this section is a three-page "Analysis of Cutting Alternatives" (pp. 386-88), inserted after the "Monogahela" decision (*West Virginia Division of Izaak Walton League of America v. Butz*, 552 F. 2d 945 (4th Cir. 1975)).

41. While the renewable resources environmental analysis does not specifically address management activities in Texas, it does discuss the effects of timber harvest on soil productivity, water quality, water yield, air quality, vegetation, wildlife, forage, fisheries, aesthetics, social well-being, quality of life, and civil rights in the various National Forests. The environmental analysis also discusses reforestation and timber stand improvement aspects of timber management. Furthermore, certain unavoidable adverse environmental impacts, the relationship between local short term uses of the environment versus long-term productivity, irreversible and iretrievable commitment of resources, and other matters are also treated.

42. Insofar as the National Forests of Texas are concerned, RPA is inadequate in the following aspects:

a. It fails to discuss the National Forest Service proposal of clearcutting and converting a major portion of the federal forests in Texas mainly to a single species.

b. It fails to discuss the long-range effects of clearcutting over one or more entire rotations.

c. It fails to discuss the effects of clearcutting on individual species of plants, other than trees.

d. It fails to discuss the effects of clearcutting on individual species of animals, except for conflicting statements about deer and fisheries.

e. It fails adequately to compare the effects of clearcutting and selective harvesting, in order that the decisionmaker could make an informed and rational choice; likewise, it does not allow those who are not a



part of the decision-making process adequately to evaluate and balance the various factors on their own. The RPA merely states the conclusion that selective harvesting will reduce timber production.

f. It fails to give authoritative statistics in support of many of its conclusions, including its contradictory conclusions that selective harvesting would reduce timber production by "5% to 20%" (p. 363), "30%" (p. 364), and "90%" (p. 387).

g. It fails to discuss the differences in quality between the large hardwoods killed in clearcutting and the sometimes diseased and damaged sprouts which come back from the roots after clearcutting.

h. It fails to discuss the effect of clearcutting on the original ecosystem, and the resultant losses of resources for science, medicine, organized education, and unorganized nature study.

i. It fails adequately to discuss the effects of clearcutting and pine regeneration on recreation. On this topic, RPA does not make reference to such forms of recreation as walking, camping, bird-watching, photographing, or hunting.

j. It fails to discuss the effect of clearcutting on the water table.

43. Prior to authorizing timber sales in the National Forests of Texas and elsewhere, the Forest Service performs an interdisciplinary review by wildlife biologists, soil scientists, and other specialists. This review is made approximately three years prior to sale. Another review is conducted immediately prior to the formulation of the yearly action plan, to assure that action is based on the current situation and guidelines.

44. The Forest Supervisor's staff includes expert wildlife biologists, soil scientists, hydrologists, landscape architects,

engineers, foresters, and other specialists who participate in making management decisions. These specialists on the Forest Supervisor's staff work in a number of ways, including on-the-ground resource inventorying, consultation with other Forest Service personnel in timber management planning and compartment prescription review, and preparation of environmental analysis reports and environmental impact statements. Timber harvest proposals are sometimes modified by these specialists, in attempting to conform to and balance other resource requirements and in seeking to avoid major environmental impacts.

45. Based on an environmental analysis, the Forest Service makes a determination as to whether an environmental impact statement will be prepared on a given action. The environmental analysis is developed by an interdisciplinary team.

46. An environmental analysis results in either a negative declaration (*i. e., a* declaration that an environmental impact statement is not required), a modification of the proposed action and then a negative declaration, or a decision to prepare an environmental impact statement. Negative determinations are reversible, should controversy or other later events require an environmental statement to be written. Environmental analyses are developed for a variety of actions, such as special use permits, prescribed burning activities, compartment prescription, recreation, parking lots, roads, and other management activities.

47. Based on compartment prescriptions, which are developed and reviewed by interdisciplinary teams and environmental analysis reports, and individual activities, the Forest Supervisor, or his deputy, makes a determination of the possible environmental impacts of any proposed action, including timber sales.



48. The Service has not filed with the Council on Environmental Quality an environmental impact statement on any of the executed or proposed sales of timber in the National Forests of Texas, nor on its practice of even-age management and predominantly single species regeneration (as the only system, instead of one of the systems of timber management).

49. The Forest Service has completed three land management plans which were accompanied by Environmental Impact Statements. Two were on the Caddo and Lyndon B. Johnson National Grasslands, and the other on the Conroe Unit of the Sam Houston National Forest. Another, the Sabine Unit Plan and Environmental Impact Statement, is in draft form and presently receiving public comment. At the time of trial, preparations for the San Jacinto Unit Charette at the end of January, 1977, were progressing.

50. The "Final Environmental Impact Statement and Unit Plan" for the proposed Conroe Unit of Sam Houston National Forest includes that part of the Raven Ranger District west of Interstate 45, but not the part containing Compartments 72 and 73. The Forest Service filed this statement with the Council on Environmental Quality on July 23, 1976.

51. In preparation of the Conroe Unit Plan and Environmental Impact Statement, the Forest Service sought public involvement. A focal point of this involvement was the "charette," a week-end workshop with members of the public invited to participate in making recommendations for future management of the Conroe Unit. Public "issues of concern" were a part of the planning packet given to each charette participant. The approximately 200 people who attended the charette were divided into ten teams and encouraged to develop additional "issues of concern".

52. Prior to the charette, the Forest Service prepared inventories of the soils, vegetation, wildlife, recreation, range, transportation, special uses, road construction areas, wilderness proposals, visually sensitive areas, and other matters for use by the public and the Forest Service in developing a plan for the Conroe Unit. A planning packet was prepared which consolidated summaries of the basic resource data. A base map and fourteen resource overlays were also given to each team.

53. A participant on one team proposed a system of uneven-aged management as an alternative to clearcutting.

54. In the public part of the charette, there was a heavy weighing toward involvement of special interest groups: only ten out of 170 charette participants could be considered as non-affiliated with public agencies, special interest organizations, private industry or education.

55. At the conclusion of the public part of the charette, the public was invited to attend the Forest Service portion of the charette, where the team recommendations were discussed by the Forest Service staff and a proposed plan was decided upon.

56. At the conclusion of the charette process on the Conroe Unit of the Sam Houston National Forest, a draft plan and impact statement were prepared and filed with the Council on Environmental Quality (CEQ). Upon being filed with the CEQ, the draft plan and impact statement were circulated to the general public. Notice of availability of the draft EIS was published in the Federal Register.

57. After an analysis of the comments on the draft Conroe Plan and Impact Statement, a final Conroe Unit Plan and Environmental Impact Statement was prepared, incor-



porating some suggestions and revisions, and filed with the Council on Environmental Quality.

58. The final Conroe Unit Plan and Environmental Impact Statement is deficient in the following respects:

(a) It discusses only the method of sawlog harvest which concludes in a clearcut;

(b) It barely mentions the alternative of selective harvesting of nature trees, the principal method of sawlog harvesting in the National Forests prior to 1964, and a classic method of forest management;

(c) It largely ignores the consequences of its hardwood killing practices (by which the hardwoods were reduced to six percent) and fails to consider the alternative of restoring the forests to their former balance;

(d) It fails to discuss the effects of massive (as distinguished from minor) clearcutting on wildlife, recreation, water supply, soil erosion, fire, insects, and disease;

(e) It fails to discuss the long range result of clearcutting all the commercial stands in the National Forests of Texas and planting the vast majority to one species, *i.e.*, pine;

(f) It limits to a ten-year period its consideration of any effects;

(g) It accepts a seventy-year rotation for loblolly pine, without considering the alternative of a longer rotation;

(h) It proposes regeneration of only two upland hardwood sites in ten years, without stating any impacts of such a limitation;

(i) Although it predicts a higher crown-density of hardwoods in loblolly pine forests, the environmental impact statement gives no explanation of how magnolia,

beech, oak and hickory, or other hardwood species will be brought back; the omission assumes importance, since magnolia, beech, oak, and hickory generally do not come back in top condition after a clearcut, even if planted;

(j) It discusses mainly a concentrated structural approach to recreation, and fails to discuss the economic or aesthetic advantages of use of the open forest;

(k) It fails to mention the loss of the natural ecosystem, resulting from a largely single-species regeneration, as an irreversible or irretrievable commitment of resources;

(l) It fails to consider joint recreational, water and timber use of the same area, as distinguished from segregating these uses;

(m) It fails to explain how sustained yield will be achieved; and

(n) It fails to include an adequate cost-benefit analysis.

59. The Forest Service has been taking special measures to protect the red-cockaded woodpecker for any years. Among the measures employed are protection of woodpecker habitat and establishment of special management areas for the woodpecker. The National Forests in Texas have recognized the need to provide special management for the red-cockaded woodpecker as far back as 1968. A current inventory of the location of all known active colonies is maintained at each district office and a copy of all inventories is maintained in the Forest Supervisor's Office. These colonies are inventoried anually.

60. In the development of its guidelines for the protection of the red-cockaded woodpeckers, the Forest Service worked closely with the many federal and state agencies, and specifically with the recovery team established by the Fish and Wildlife Service of the Department of the Interior. A Forest Service biologist is an active member of the recovery team. All red-cockaded woodpecker inventory data existing on the Texas National Forest has been made available to the recovery team.



61. The guidelines developed by the Forest Service essentially provide for special management of the red-cockaded woodpecker colony, which includes a 200 foot buffer zone around the aggregate of cavity trees, and the maintenance immediately adjacent to the colony of a support stand which must be of a minimum forty acres. In most cases, the Forest Service leaves a far greater support stand than the 'nimum forty acres.

62. As information on the red-cockaded woodpecker has evolved, so have the Forest Service guidelines designed to protect this endangered species. The recommendations of the red-cockaded wodpecker recovery team are not yet final. The Forest Service is committed to acceptance of any final recommendations of the recovery team. In this interim period, the Forest Service guidelines will not jeopardize the continued existence of the red-cockaded woodpecker.

## *CONCLUSIONS OF LAW*

1. This court has jurisdiction of this civil action pursuant to 28 U.S.C. § 1331(a).

2. The plaintiff has standing to bring this civil action.

3. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4331 *et seq.* (1970), provides:

> [I]t is the continuing policy of the Federal Government . . . to create and maintain conditions under

which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

4. NEPA makes environmental protection a part of the mandate of every federal agency and department. *Calvert Cliffs Coordinating Committee v. A. E. C.* (*Calvert Cliffs*), 146 U.S. App. D.C. 33, 36, 449 F. 2d 1109, 1112 (1971). Congress included in NEPA certain "action forcing" provisions in Section 102 hereafter set out), to implement its policy of environmental protection. Conference Report on NEPA, 91st, Cong., 2d Sess, 115 Cong. Rec. 40515, 40516 (1969) remarks of Senator Jackson).

5. Section 102 of NEPA (42 U.S.C. § 4332 (1970), *as amended by* 42 U.S.C.A. § 4332(2) (D)—(I) (Supp.1976)), in part, that:

> [T]o the fullest extent possible . . . (2) all agencies of the Federal Government shall . . . (C) include in every recommendation and report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detained statement by the responsible official on —
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments



> of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the . . . agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public . . . and shall accompany the proposal through the existing agency review process . . .

6. In order to comply with section 102(2) (C) of NEPA, 42 U.S.C. § 4332(2) (C) (1970), which requires that an agency solicit comments on its plans prior to preparing the environmental impact statement (EIS), agencies must prepare two impact statements—a draft statement and a final statement. *See* 40 C.F.R. § 1500.7(a) (1976). The draft statement must circulate for review and comment to federal and federal-state agencies that have jurisdiction by law, or have special expertise with respect to the environmental effect involved, 40 C.F.R. § 1500.9(a) (1) (1976), and to the public 40 C.F.R. § 1500.9(d) (1976). Before preparing the final statement, which must also be circulated for comment, comments on the draft statement are to be carefully evaluated and considered. C.F.R. § 1500.7(a) (1976). Copies of substantive comments received on the draft statement are to be attached to the final statement. 40 C.F.R. § 1500.10(a) (1976). Only the final statement satisfies NEPA; a draft statement prepared without the solicitation of comments does not fulfill the requirements of section 102(2) (C).

[1] 7. It is unquestioned that the initial determination of NEPA's applicability to a given action lies with the federal agency undertaking the action. *E. g., Hanly v. Mitchell* (*Hanly I*), 460 F. 2d 640, 644 (2d Cir. 1972), *cert. den. sub nom. Hanly v. Kleindienst*, 409 U.S. 990, 93 S. Ct. 313, 34 L. Ed. 2d 256 (1972). However, the federal courts disagree

as to the proper standard of judicial review. Moreover, the decisions have varied as to the standard to be employed by an agency in concluding the NEPA is inapplicable.

8. One view is that an agency should be granted wide latitude in deciding NEPA's applicability to a proposed action, and relegates to the court the task of ascertaining merely whether the agency has abused its discretion by arbitrary and capricious decision-making. *See, e. g., Hanly v. Kleindienst* (*Hanly II*), 471 F. 2d 823, 830 (2d Cir. 1972), *cert. den.*, 412 U.S. 908, 93 S.Ct. 2290, 36 L.Ed.2d 974 (1973).

9. The other view subjects the agency's negative determination to close scrutiny and analyzes all relevant factors to resolve whether the agency's decision was reasonable. *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975); *Save Ten Acres v. Kreger* (*SOTA*), 472 F.2d 463 (5th Cir. 1973); *Minnesota Public Interest Research Group v. Butz* (*MPIRG*), 498 F.2d 1314, 1320 (8th Cir. 1974).

[2] 10. In *SOTA, supra*, the Court of Appeals for the Fifth Circuit declared that NEPA's basic policy was to ensure that Congress and others receiving the agency's recommendations would have a "sound basis for evaluating the environmental aspects" of the project involved. *Id.*, at 466.

> The spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review. *Id.*

Emphatically rejecting the General Service Administration's contention that the limited "arbitrary and capricious" standard was the proper test of the threshold decision to comply *vel non* with NEPA's filing requirements, the



court insisted that "the primary decision to give or bypass the consideration required by the Act must be subject to inspection under a more searching standard." *Id.*, at 466. The court enunicated this standard as a "more relaxed rule of reasonableness." *Id.* at 465. *See also Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

11. Under Section 102 of NEPA, *supra*, a federal agency must file an impact statement on a proposed action, if it is a "major Federal action significantly affecting the quality of the human environment." In *Hanly I, supra*, 460 F.2d, at 644, the court held that the term "major federal action" referred to the cost of the project, the amount of planning that preceded it, and the time required to complete it, but did not refer to the impact of the project on the environment.

12. The primary question in defining this phrase is whether Congress intended to create one criterion or whether it intended to create two tests, whereby:

> First, it must be determined whether there is a major federal action; next, if there is a major action, the impact of that action on the environment must be determined. This interpretation was adopted in *Hanly I, supra* at 644.

MPIRG, supra, 498 F.2d, at 1321.

[3] 13. The fallacy of the interpretation contended for in *Hanly I* was shown in MPIRG, supra:

> By bifurcating the statutory language ["major Federal actions significantly affecting the quality of the human environment"], it would be possible to speak of a "minor federal action significantly affecting the quality of the human environment," and to hold NEPA inapplicable to such an action. Yet if the action has a significant effect, it is the intent of NEPA that it should

> be the subject of the detailed consideration mandated by NEPA; the activities of federal agencies cannot be isolated from their impact upon the environment.

Id., 498 F.2d, at 1321-22. It follows that a finding of significant environmental effects is the determining factor for imposition of the NEPA impact statement requirement. *See also Simmans v. Grant*, 370 F.Supp. 5, 13 (S.D.Tex. 1974).

[4] 14. In *Hiram Clarke Civic Club v. Lynn*, 476 F. 2d 421 (5th Cir. 1973), and in *SOTA, supra*, 472 F.2d, at 467, the Court of Appeals for the Fifth Circuit showed agreement with guidelines promulgated by the Council on Environmental Quality (CEQ):

> Significant effects can . . . include actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

CEQ Guidelines, 40 CFR § 1500.6(b) (1976). As stated in *Hiram Clarke, supra*, 476 F.2d, at 427, ". . . Congress was not only concerned with just adverse effects but with *all* potential environmental effects that affect the quality of the human environment."

[5, 6] 15. Preparation of an environmental impact statement is required, even if the effects may potentially exist or are presently unknown.

> [O]ne of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown . . . Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry".



*Scientists' Institute For Public Information, Inc., v. A. E. C. (SIPI)*, 156 U.S.App.D.C. 395, 408, 481 F.2d 1079, 1092 (1973). In accordance with *Calvert Cliffs, supra*, the Fifth Circuit found that if the project "may cause" a significant environmental impact, an EIS is required. *SOTA, supra*, 472 F.2d, at 467.

[7] 16. The CEQ Guidelines require that "significantly affecting the environment" must be taken as meaning "a view [of] the overall cumulative impact of the action proposed, related federal actions, and projects in the area, and further actions contemplated." 40 CFR § 1500.6(a) (1976). Thus, effects evolving from an action which is a small step in a larger total plan, in combination with the effects of the larger plan, meet the definition. *MPIRG, supra*, 498 F.2d, at 1320 n.18; *SOTA, supra*, 472 F.2d, at 467 n.7; *City of Rochester v. United States Postal Service*, 541 F.2d 967, 972 (2d Cir. 1976). *Cf., Kleppe v. Sierra Club*, 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976).

17. If initial agency decisions are particular or single activities are dealt with as being comparatively unimportant, thereby failing to merit EIS treatment, or as excuses for large-scale action on an after-the-fact basis, the decisions and activities may escape adequate environmental review.

> [T]o allow environmental impact statements to be filed as construction proceeds in a piecemeal fashion, thus limiting the impact and scope of an environmental analysis to relatively small segments . . . would result in ignoring the environmental impact of the entire system, in determining its ultimate effect on the environment, and in weakening the consideration of alternatives.

*Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 14 (8th Cir. 1973). See *also SOTA*, *supra*, 472 F.2d, at 467; *MPIRG*, *supra*, 498 F.2d, at 1320; *Jones v. District of Columbia Redevelopment Land Agency*, 162 U.S.App.D.C. 366, 499 F.2d 502, 511 (1974), *cert. den.*, 423 U.S. 937, 96 S.Ct. 299, 46 L.Ed.2d 271 (1975); *City of Rochester v. United States Postal Service*, *supra*, 541 F.2d, at 972.

[8] 18. NEPA created the CEQ to assist and advise the President and to review and appraise activities of the federal government in the light of NEPA policies. Courts have recognized the CEQ's role and have often used CEQ Guidelines to measure the adequacy of a federal agency's EIS, although holding them to be "merely advisory". *E. g.*, *Environmental Defense Fund, Inc. v. Corps of Engineers (Tombigbee Waterway)*, 492 F.2d 1123, 1138 (5th Cir. 1974); *Hiram Clarke Civic Club, Inc., v. Lynn*, *supra*, 476 F.2d, at 424. It is meaningful, then, that the CEQ Guidelines state that "[p]roposed major actions, the environmental impact of which is likely to be highly controversial, should be covered [by an EIS] in all cases." 40 CFR § 1500.6(a) (1976). (Emphasis added.) The expression "controversial" relates to situations where a substantial dispute exists as to the environmental effects of the proposed action and not merely to opposition to the intended use of the project. *Rucker v. Willis*, 484 F.2d 158 (4th Cir. 1973); *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972).

19. Section 11 of the CEQ Guidelines states:

> To the maximum extent practicable the section 102(2)(c) procedure should be applied to further Federal actions having a significant effect on the human environment even though they arise from projects or programs initiated prior to the Act on January 1, 1970.



40 C.F.R. § 1500.11(b) (1976). Thus, as held in *MPIRG*, *supra*, 498 F.2d, at 1321, when a project commenced prior to the passage of NEPA constitutes a major federal action significantly affecting the quality of the human environment, NEPA applies.

[9] 20. The decision of the Forest Service, in 1964, to adopt even-age management in the National Forests of Texas obviously constituted a major federal action. There is strong evidence in the record that the system of even-age management will significantly affect the quality of the human environment, for even though a relatively small portion of the National Forests in Texas is denuded by virtue of any one timbercutting contract awarded by the Forest Service, the cumulative effect of such massive clearcutting is vast, and will become greater, if permitted. There likewise can be no doubt that the environmental impact of a program of extensive clearcutting in these forests is controversial, despite the belief of the Forest Service that the program is beneficial. It follows that, when NEPA was obligated to review the overall cumulative effect of clearcutting, so as to be able to forecast whether it might cause a significant effect on the quality of the human environment, including an indication of the extent of essentially unknown consequences.

21. The Forest Service's policy of filing negative declarations as to nearly all clearcuts, treating such activities as comparatively unimportant, so as not to require an EIS, allowed the Forest Service's decision of 1964 to escape adequate environmental review. Further, the preparation of an EIS limited only to a particular unit of the National Forest contributed to the same result, since the environmental analysis was thus confined to a relatively small portion of the forests. This breakdown of analysis into such

minor components tended to make the overall effects of the program imperceptible.

22. The court, after weighing the evidence submitted at the trial of this civil action, determines that the Forest Service could not have reasonably concluded that, except in the two instances where an EIS has been prepared, the imposition of a system of even-age management in the National Forests in Texas would have no effects which would significantly degrade our human environmental quality, thus obviating the need for environmental impact statements, *SOTA*, *supra*, 472 F.2d, at 467.

23. The court further determines that, under even the most limited review of the Forest Service's decision not to file environmental impact statements in other than the two instances noted above, it must be found that the Service, in filing such negative declarations, acted arbitrarily and capriciously. *Hanly v. Kleindienst* (*Hanly II*), supra.**

[10] 24. Section 1502(2)(B) of NEPA requires federal agencies to "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations." 42 U.S.C. § 4332(2)(B). "Existence value" (which "refers to that feeling some people have just knowing that somewhere there remains a true wilderness untouched by human hands . . ."), *MPIRG*, *supra*, 498 F.2d, at 1322 n.27, and socioligical and psychological effects have also been mandated for inclusion in EIS's. *Hanly I*, *supra*, 460 F.2d, at 647. Thus, NEPA requires a thorough cost-benefit study in each case before

**Much of the analysis and language of the foregoing Conclusions of Law were derived from Baum, Canary, Reeve and Scott, *Negative NEPA:* The Decision Not to File, 6 Env.L. 309 (1975).



undertaking major federal action affecting the quality of the human environment. *Calvert Cliffs*, *supra*, 449 F.2d, at 1128; *Natural Resources Defense Council, Inc. v. Morton*, 148 U.S. App.D.C. 5, 458 F.2d 827 (1972). As held by the Fifth Circuit,

> [A]n impact statement [must] provide "a basis for (a) evaluation of the benefits of the proposed project in light of its environmental risks; and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action."

*Environmental Defense Fund v. Corps of Engineers* (*Tombigbee Waterway*), *supra*, 492 F.2d, at 1136 (quoting from *Natural Resources Defense Council, Inc. v. Morton*, *supra*, 458 F.2d, at 833).

25. Compliance with subsection 102(2)(B) of NEPA, however,

> cannot be fairly read to command an agency to develop or define any general or specific quantification process. * * [C]ompliance with this subsection does not require that every environmental amenity be reduced to an integer capable of insertion in a "go-no go" equation. * * * [M]any environmental values cannot be fixed even with a given project area, and . . . others are bound to vary in value from place to place and time to time.

*Id.*, 492 F.2d at 1133. *See also Sierra Club v. Morton*, *supra*, 510 F.2d, at 827. (*But see Tribe, Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 88 Yale L.J. 1315, 1317-22(1974)).

26. In connection with the requirement of Subsection 102(2)(E) of NEPA, 42 U.S.C.§ 4332 (1970), *as amended* by 42 U.S.C.A. § 4332(2)(D)-(I) (Supp. 1976)), that an

agency "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources," it is mandated that

> . . . the agency acknowledge and consider "responsible scientific opinion concerning possible adverse environmental effects" which is contrary to the official agency position . . . *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 149 U.S.App.D.C. 380, 463 F. 2d 783, 787 (1971).
>
> * * * * *
>
> [A] reviewing court must examine the record in detail to determine that a real give and take was fostered on the key issues. This does not give the court a license to judge for itself how much weight should be given particular pieces of scientific or technical data, a task for which it is singularly ill-suited. It does require, however, that the court examine the record so that it may satisfy itself that the decision was based "on a consideration of the relevant factors." [Citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971)]. Where only one side of a controversial issue is developed in any detail, the agency may abuse its discretion by deciding the issues on an inadequate record.

*Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 547 F.2d 633-46 (D.C.Cir. 1976). *See also Aeschliman v. United States Nuclear Regulatory Commission*, 557 F.2d 622, 629 (D.C.Cir.1976).

> [N]o major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the whole project, or of accomplishing the same result by entirely different means. * * * [T]he congressional mandate to develop alternatives would be thwarted by ending



> the search for other possibilities at the first proposal which establishes an ecological plus, even if such a positive value could be demonstrated with some certainty.

*Environmental Defense Fund, Inc. v. Corps. of Engineers (Tombigbee Waterway)*, *supra*, 492 F.2d, at 1135.

> A reviewing court must assure itself not only that a diversity of informed opinion was heard, but that it was genuinely considered. * * * [W]here apparently significant information has been brought to [the agency's] attention, or substantial issues of policy or gaps in its reasoning raised, the statement * * * must indicate why the agency decided the criticisms were invalid. [Citing *Portland Cement Ass'n v. Ruckelshaus*, 158 U.S.App.D.C. 308, 486 F.2d 375, 303-95 (1973), *cert. denied*, 417 U.S. 921, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1974)] * * * [W]hat is required is a reasoned response, in which the agency points to particulars in the record which, when coupled with its reservoir of expertise, support its resolution of the controversy. [Citation omitted.] An agency may abuse its discretion by proceeding to a decision which the record before it will not sustain, in the sense that it raises fundamental questions for which the agency has adduced no reasoned answers.

*Natural Resources Defense Council, Inc. v. United States Nuclear Commission*, *supra*, 475 F.2d, at 646.

> The court's task is to determine whether the EIS was compiled with objective good faith and whether the resulting statement would permit a decisionmaker to fully consider and balance the environmental factors.

*Sierra Club v. Morton*, *supra*, 510 F.2d, at 819. *But see Environmental Defense Fund, Inc. v. Corps of Engineers (Tombigbee Waterway)*, *supra*, 492 F.2d, at 1136.

> . . . NEPA assumes as inevitable an institutional bias within an agency proposing a project and erects the procedural requirements of § 102 to insure that "there is no way [the decision maker] can fail to note the facts and understand the very serious arguments advanced by the plaintiffs if he carefully reviews the entire environmental impact statement." [*Environmental Defense Fund v. Corps of Engineers*, 342 F. Supp. 1211, 1218 (E.D. Ark.1972).]

*Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 295 (8th Cir. 1972).

> Then, if the decisionmakers choose to ignore such factors, they will be doing so with their eyes wide open.

*Environmental Defense Fund v. Corps of Engineers*, 325 F.Supp. 749, 759 (E.D.Ark. 1971) (cited with approval by the Fifth Circuit in *Environmental Defense Fund v. Corps of* Engineers (Tombigbee Waterway), supra, 492 F.2d, at 1136).

> 27. At least in the NEPA context, an agency has the affirmative obligation to explore the issues in depth, rather than wait passively until an intervenor takes the initiative. *See Calvert Cliff's Coordinating Comm. v. AEC*, . . . note 14, 449 F.2d at 1118-19. * * * "[W]hen the record is deficient, the [agency] may even have a duty to consider issues ignored by the parties." [Note, "The Use of Generic Rulemaking to Resolve Environmental Issues in Nuclear Power Plant Licensing," 61 Va.L.Rev. 869, at 891.]
>
> In both *Calvert Cliffs* and *Scenic Hudson* [*Preservation Conference v. FPC*, 354 F.2d 608, 620-621 (2 Cir. 1965), *cert. denied*, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1966)], the court pointed out that poorly-financed public interest intervenors may lack the wherewithal to marshal technical evidence and bring it to the [agency's] attention.



*Natural Resources Defense Council v. United States Nuclear Regulatory Commission supra*, 547 F.2d, at 645 n. 34.

28. Both sides having buttressed their respective positions by scientific evidence from reputable sources, it is manifest that a substantial dispute existed as to the environmental effects of clearcutting. It is also evident that this controversy is not limited to the National Forest of Texas. *See, e. g., Wyoming Outdoor Coodinating Council v. Butz, supra*, 484 F.2d, at 1249-50; *West Virginia Division of Izaak Walton League of America V. Butz, supra*, 522 F.2d 945; Senate debates on National Forest Management Act of 1976, 94th Cong., 2d Sess., 122 Cong.Rec. 14513-16 (1976) (remarks of Senator Randolph). Yet in the face of the highly controversial nature of its clearcutting program, the Forest Service, in violation of CEQ Guidelines, saw fit to make only one reference in the EIS for the Conroe Unit of the Sam Houston National Forest to an alternative forest management system, a definition of "All-aged Forest or Uneven-aged Forest" (page 46, EIS).

29. Three management options are shown on page 74 of the EIS:

1. Practice intensive high yield, short rotation forestry to maximize wood product production.
2. Practice highly modified forestry with objective of producing high yields of recreation, wildlife and natural scenery with reduced timber yields.
3. Practice sustained yield, multiple use forestry with timber production in harmony with other resources.

It is possible to infer that the second option had relation to uneven-aged management, and that the third applied to the ongoing even-aged system. However, no explication was

afforded to demonstrate the superiority of the third option, which was the one chosen by the Forest Service.

30. At the public "Charette", mention was made by one participant of the alternative of uneven-aged management. Nevertheless, the EIS makes no mention of or comment upon the suggestion.

[11] 31, The Forest Service's failure to explore the feasibility of uneven-aged management in the EIS for the Conroe Unit amounted to a breach of its duty to acknowledge and consider responsible scientific opinion contrary to its official position. The uneven-aged management system was described by a witness for the Forest Service as "classic". Thus, the Forest Service's failure to take into account the uneven-aged system as an alternative to clearcutting constituted a violation of both the procedural and substantive provisions of NEPA, specifically, the requirement that an agency obtain information on the effects of and alternative to a proposed action and consider this information when making a decision on the proposed action. 42 U.S.C.A. § 4332 1970, *as amended by* 42 U.S.C.A. § 4332(1) (D)-(I). *Environmental Defense Fund, Inc. v. Corps of Engineers (Tombigbee Waterway), supra,* 492 F.2d, at 1135, 1139-40 n. 33; *Sierra Club v. Morton, supra,* 510 F.2d, at 825, 829. As stated by the Court of Appeals for the Second Circuit in *Natural Resources Defense Council v. Callaway,* 524 F.2d 79, 92-93 (2d Cir. 1975):

> It is absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as "the linchpin of the entire impact statement," *Monroe County Conservation Society v. Volpe,* 472 F.2d at 697-98. Indeed the development and discussion of a wide range



> of alternatives to any proposed federal action is so important that it is mandated by NEPA when any proposal "involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2) (D).

This non-observance of the law by the Forest Service can only be characterized as arbitrary and capricious.

32. The EIS prepared for the Conroe Unit of the Sam Houston National Forest was not compiled with objective good faith by the Forest Service. Its presentation of tree harvesting methodology was one-sided to the extreme; and there existed no way by which, from an examination of the document, a decisionmaker could have understood that there were alternatives, even if he had carefully reviewed the EIS. Since one of the relevant factors was not given consideration in the EIS, the Forest Service's violation of the demands of NEPA in this respect constituted an abuse of its discretion.

[12] 33. The absence of a cost-benefit analysis was noted by a commentator on the draft EIS. The only response of the Forest Service was as follows:

> Detailed job lists which include cost data are an integral part of the plan. However, because of length, they are not reproduced as a part of the distributed plan. Cost/benefit types of analyses are difficult in such an extensive plan as this and, because we are dealing with amenity (rather than monetary values), they are often difficult to interpret.

Page 126, Final Environmental Impact Statement and Unit Plan, Sam Houston National Forest. The nonfulfillment of the requirement for a cost-benefit analysis also results in a legally insufficient EIS. *Sierra Club v. Froehlke (Trinity-Wallisville Project),* 359 F.Supp. 1289, 1362-65; (S.D.Tex.

1973). rev'd on other grounds sub nom *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974); *Calvert Cliffs, supra*, 449 F.2d, at 1128; *Environmental Defense Fund, Inc. v. Corps of Engineers (Tombigbee Waterway), supra*, 492 F.2d, at 1134-35.

> [A]n environmental statement should be prepared if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal Action.

40 C.F.R. § 1500.6(a) (1976).

35. The CEQ has also issued guidelines stating the advantages of a programmatic EIS: "it provides an occasion for a more exhaustive consideration of effects and alternatives than would be practicable in a statement on an individual action. It ensures consideration of cumulative impacts that might be slighted in a case-by-case analysis. And it avoids duplicative reconsideration of basic quality questions." CEQ, Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements (May 16, 1972), quoted in *SIPI, supra*, 481 F.2d, at 1087-88.

36. In *Kleppe v. Sierra Club, supra*, 427 U.S., at 410, 96 S.Ct., at 2730, the Supreme Court held:

> [W]hen several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.

37. The Court further held:

Cumulative environmental impacts are . . . what require a comprehensive impact statement.



*Id.*, at 413, 96 S.Ct. at 2732.

[13] 38. The National Forests of Texas are all situated in the region known as East Texas. The program to clearcut all timber left available for timber management purposes in the National Forests of Texas was decided upon by the Forest Service in 1964. At the trial of this civil action, the Forest Supervisor proposed to continue the program to completion. It is clear that the program of clearcutting, if permitted to continue, may cause significant cumulative or synergistic impacts upon the quality of the human environment in the entire region. Under these circumstances, the Forest Service's failure to file a programmatic EIS relating to the program at any time subsequent to the passage of NEPA was arbitrary and capricious. Moreover, such a programmatic EIS is required in order that:

(1) Exhaustive consideration can be given to the cumulative or synergistic environmental impact of the program on the region;

(2) A thorough analysis of alternatives to the program can be conducted; and

(3) Duplicative reconsideration of the program can be avoided.

39. The programmatic EIS concerned with clearcutting in the National Forests of Texas should be prepared in accordance with NEPA and should (without limitation of the generality of the foregoing) disclose the following:

(1) the suitability of the various portions of such National Forests for timber management;

(2) inventory data on the various renewable resources, including pertinent maps, graphic material, and explanatory aids;

(3) special conditions or situations involving hazards to such resources occasioned by clearcutting and their relationship to alternative activities;

(4) the economic and environmental aspects of the related systems of silviculture which could be employed in the National Forests of Texas, and methods to protect forest resources;

(5) provisions already made or to be made for outdoor recreation, including wilderness (if any), range, timber, watershed, wildlife and fish, and any significant beneficial or harmful effects thereto which may result from clearcutting;

(6) provisions already made or to be made for diversity of plant and animal communities, and any significant effect which clearcutting may have thereon;

(7) steps to be taken to preserve the diversity of tree species similar to those existing in the East Texas region, and how they may be affected by the program of clearcutting;

(8) evaluation of the likely effects of each forest management system, as to whether it will produce substantial and permanent impairment of productivity of the lands encompassed in such National Forests;

(9) The extent to which considerations of dollar return and unit output of timber may figure into the decision to clearcut;

(10) The basis upon which the designated rotation period is chosen;

(11) why clearcutting, seed tree cutting, or other cuts chosen to regenerate an even-age stand of timber was found to be the optimum method;



(12) whether, when timber is harvested by clearcutting —

(a) soil, slope, or watershed conditions are likely to be irreversibly damaged;

(b) there is assurance that lands subjected to such cutting method can be adequately restocked within five years after harvest; and

(c) protection is provided by streams, streambanks, shorelines, lakes, wetlands, and other bodies of water from detrimental changes in water temperatures, blockages of water courses, and deposits of sediment, where harvests are likely seriously and adversely to affect water conditions or fish habitat.

40. Recent legislation requires that the Secretary of Agriculture promulgate regulations, "under the principles of the Multiple-Use Sustained-Yield Act of 1960, that set out the process for the development and revision of land management plans," by October 22, 1978. 16 U.S.C.A. §1604(g) (1976). Specific reference is made in the statute to the instances when clearcutting will be permitted, 16 U.S.C.A. § 1604(g) (3) (F) (i) (1976)—"when it is determined to be the optimum method." It is to be noted that this contrasts with the standard for any other cutting method, that is, in instances when "it is determined to be appropriate."

41. In view of the imminence of the promulgation of these regulations, it is not necessary that the validity of plaintiff's claim that the Forest Service is presently violating the Multiple-Use Sustained-Yield Act of 1960 be inquired into.

42. It has been stated that

. . . in the absence of extraordinary equities on the government's side, the requirement of an impact state-

> ment must be enforced by an injunction whenever the proposed project poses a substantial risk of damage to the environment and there exists a reasonable possibility that adequate consideration of alternatives might disclose some realistic course of action with less risk of damage.

*Sierra Club v. Mason*, 351 F.Supp. 419, 427 (D.Conn. 1972). Because of the probability that an irreversible commitment of resources is now being made, the Forest Service's clearcutting activities pose a substantial threat of irreparable injury such as to warrant injunctive relief. While mindful of the economic and social costs which may result from the issuance of an injunction here, the court is nevertheless persuaded that the equities require such action. "[C]ompliance with NEPA invariably results in delay and concomitant cost increases, and Congress has implicitly decided that the costs must be discounted." *Steubing v. Brinegar*, 511 F.2d 489, 497 (2d Cir. 1975).

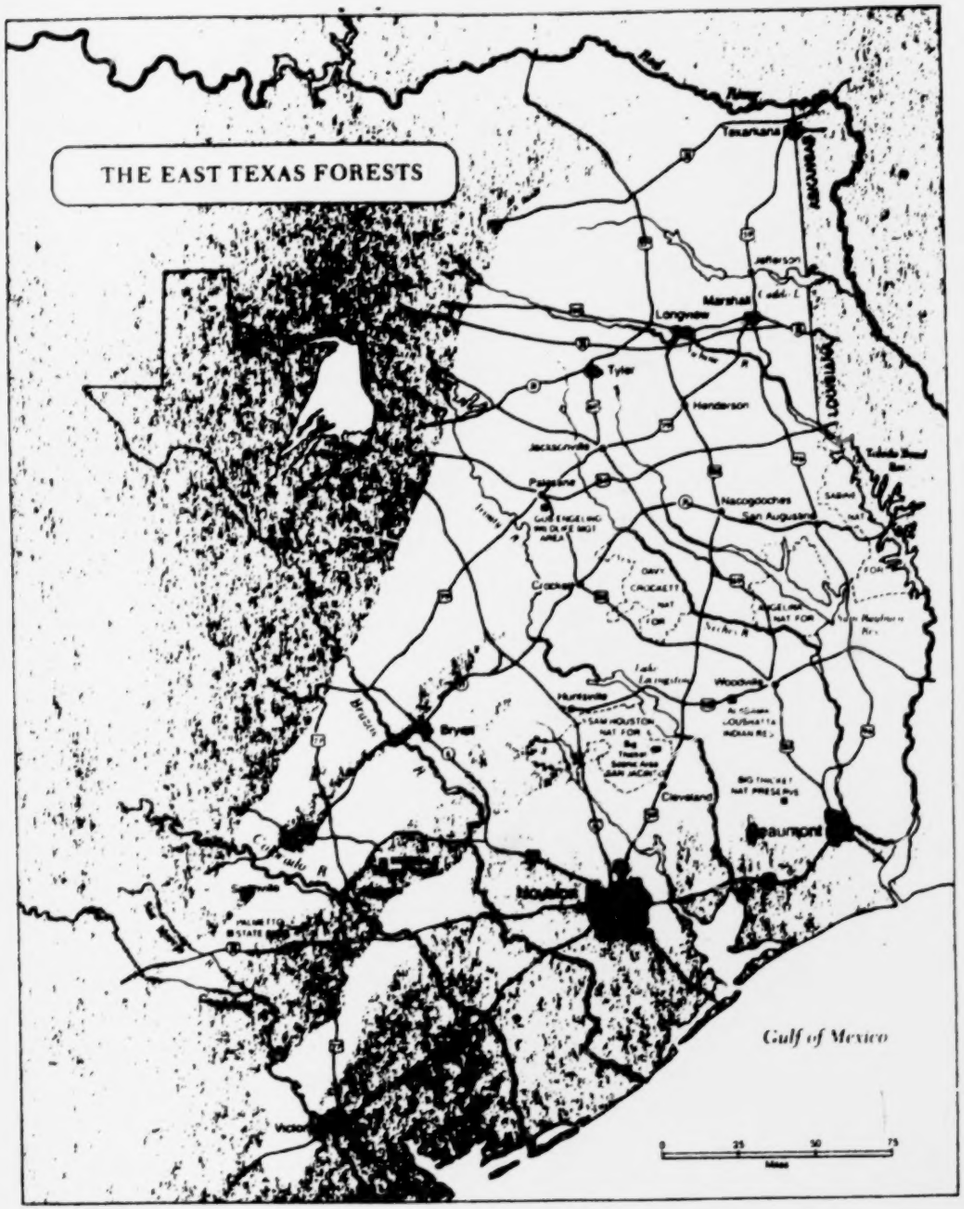
[14] 43. Plaintiff is thus entitled to an injunction which will permanently enjoin defendant from permitting any clearcutting, seed tree cutting, shelter-wood cutting, or other cuts designed to regenerate even-ages stands of timber in the National Forests of Texas until such time as: (1) defendant has prepared a programmatic EIS (including the requirements set forth in Conclusion of Law No. 39, *supra*), in accordance with the various procedures specified in Conclusion of Law No. 6, *supra;* (2) the final programmatic EIS has received the approval of this court; and (3) such final programmatic EIS has, afterwards, been filed with the CEQ.

44. Plaintiff is entitled to no relief other than that specifically mentioned in these Conclusions of Law.



45. This court should retain jurisdiction of this civil action, in order to superintend the effectuation of the injunction to which reference is herein made.

[See following illustration]




B-1

## APPENDIX B

**TEXAS COMMITTEE ON NATURAL RESOURCES,**
**Plaintiff-Appellee,**

**v.**

**Robert BERGLAND, Secretary of Agriculture of the United States, et al.,**
**Defendants-Appellants.**

**Texas Forestry Association et al.,**
**Intervenors-Appellants.**

**No. 77-2671.**

United States Court of Appeals,
Fifth Circuit.

May 8, 1978.

THORNBERRY, Circuit Judge:

[1] The United States owns approximately 662,000 acres of national forest land in East Texas. This East Texas forest land is divided into four distinct and spatially separate forests — San Houston National Forest, Angelina National Forest, Sabine National Forest and Davy Crockett National Forest. The land available for timber management purposes within these national forests is administered by the United States Forest Service. Plaintiff in this action, Texas Committee on Natural Resources,[1] sued defendant Bergland,

1. Plaintiff organization is a voluntary organization supported by contributions from individual members. Various members of the organization make use of the National Forests of Texas for recreational purposes. The organization had standing to prosecute this complaint under *Sierra Club v. Morton*, 405 U.S. 727 92 S.Ct. 1361, 31, L.Ed.2d 636 (1972).

the Secretary of Agriculture, and others[2] in charge of national forests located in Texas[3] alleging that the Forest Service's failure to file an environmental impact statement with respect to even-aged timber management was in violation of the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. A number of lumber companies[4] and the Texas Forestry Association were permitted to intervene in the district court. The district court held that the Forest Service had unreasonably concluded that the use of any even-aged management system in Texas national forests did not require an environmental impact statement and that the Forest Service should be enjoined from permitting any cuts designed to regenerate even-aged stands of timber until it had prepared a programmatic environmental impact statement, approved by the court and filed with the Council on Environmental Quality. *Texas Committee on Natural Resources v. Bergland*, 433 F. Supp. 1235 (E. D. Tex. 1977). The district court also found that an environmental impact statement filed on the Conroe Unit of the Sam Houston National Forest was insufficient. We hold that the district court erred in its judgment that a programmatic environmental impact statement was required, in finding the Conroe impact statement insufficient and in its grant of injunctive relief. We also find that the provisions of the NEPA and

2. Defendant Bergland was automatically substituted as a defendant pursuant to F.R.C.P. 25(d).

3. Defendant John McGuire, Chief, Forest Service, Department of Agriculture, and John Courtenay, Forest Supervisor, National Forest in Texas.

4. Oliver Bros. Lumber Co., Inc.; Champion International Inc.; Conroe Creosoting Co.; L. R. Davis; Leggett Lumber Co., Inc.; Louisiana-Pacific Corp.; Owens Illinois, Inc.; Southland Paper Mills, Inc.; Walker Bros., Inc.; Williams Lumber Co., Inc.; Woodville Lumber Co.; A. A. Giles Bros. Lumber Co.; Davis Pulpwood Co.; Bob Currie; and Jack Alexander, Inc.



the NFMA are not irreconcilable and that the Forest Service is subject to NEPA requirements under certain circumstances.

1. Background

This is a controversy over the proper way to use and manage the timber resources within the national forests in Texas. The plaintiffs assert that the Forest Service should consider the use of a system for managing trees called uneven-aged management. In that system timber is allowed to grow in stands containing trees of different ages. Because the trees mature at varying times, selective cutting is used to harvest them. In selective cutting trees must be individually chosen and marked before they may be cut. In contrast, even-aged management, now used by the Forest Service, permits only trees of uniform age to grow within a stand. Intermediate thinnings weed out trees of less maturity prior to a final harvest, which is generally made by seed tree cutting, shelterwod cutting or clearcutting.[5] When clearcutting is used, all timber in the area is removed in one cut and the area is prepared for either natural regeneration, artificial seeding or planting of nursery-grown trees. The net result of this method is that all of the trees in an area are leveled within inches of the ground.

The sale of timber in national forests was originally controlled by the Organic Act of 1897, 16 U.S.C. § 476. That act provided for the sale of "dead, matured, or large growth of trees." In 1960 Congress passed the Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528-31. The Multiple-Use Sustained-Yield Act stated a congressional policy that national forests

5. Seed tree cutting means that certain trees are left for the purpose of seeding the surrounding ground. Under shelterwood cutting systems enough trees are left to protect immature trees against exposed conditions.

were established and were to be administered for outdoor recreation, range, timber, watershed, wildlife and fish purposes. It also provided that the Secretary of Agriculture was to develop and administer the renewable resources of the national forests for multiple use and sustained yields. The definition of "multiple use" as it pertains to timber manifested a congressional intent to balance the use of national forests between the one pole of timber production and the other of aesthetic and recreational use.[6] Congress passed the Multiple-Use Sustained-Yield Act without repealing the Organic Act of 1897.

Around 1964 the Forest Service began to implement the use of clearcutting in national forests. Conservation-oriented plaintiffs then sued, claiming that the Organic Act, 16 U.S.C. § 476, permitted harvesting of only a limited number of trees, specifically those that were dead, matured or of large growth.

6. 16 U.S.C. § 531 states that:

As used in section 528 to 531 of this title, the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.

Pub.L. 86-157, § 4, June 12, 1960, 74 Stat. 215.



*West Virginia Division of Izaak Walton League of America, Inc. v. Butz*, 522 F. 2d 945 (4 Cir. 1975). The Fourth Circuit upheld that argument and ruled that all contracts for the sale of timber which did not provide for selective, marked cutting of dead, matured, or large growth trees violated the Organic Act.

Congress responded to the *Monongahela* decision [as the Fourth Circuit case came to be called] with significant legislation. It repealed Section 476, the Organic Act, and passed the National Forest Management Act, 16 U.S.C. § 1600 et seq.

The East Texas litigation had, however, commenced before the passage of the National Forest Management Act. In 1976 plaintiffs filed a complaint asking for declaratory and injunctive relief and alleging that the defendants, by permitting clearcutting in East Texas national forests, were in violation of the Organic Act of 1897, the National Environmental Policy Act, 42 U.S.C. § 4332, the Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528 et seq., the Endangered Species Act, 16 U.S.C. § 1531 et seq., and the Wilderness Act, 16 U.S.C. § 1131. At the preliminary injunction stage the district court held that proposed timber sales in the East Texas forests violated the Organic Act of 1897 and hat clearcutting violated the Multiple-Use Sustained-Yield Act. It also held that the Forest Service had violated the National Environmental Policy Act by failing to file an environmental impact statement concerning even-aged timber management practices in the Texas national forests. Just prior to the trial on the merits the National Forest Managemen Act was signed by the President. After the trial, the district court declined to rule that clearcutting was a violation of the National Forest Management Act, the Multiple-Use Sustained-Yield Act, the Endangered Species Act or

the Wilderness Act. It did hold that failure to file an environmental impact statement for the Texas forests violated the National Environmental Policy Act.

The defendant Secretary has appealed that decision arguing that the district court's decision was an incorrect substitution of judicial opinion for that of the agency and Congress, that the district court erroneously required a programmatic environmental impact statement covering all East Texas forest land, that the NFMA affects the Secretary's responsibility under NEPA and that the injunction should not have been granted. The plaintiff appellees counter that the East Texas clearcutting program is a major federal action which requires the filing of an environmental impact statement, that there is no statutory exception which sanctions the failure to file an environmental impact statement and that the injunctive relief was a proper remedy for their complaint. They also argue that the NFMA neither exempted the Forest Service from the preparation of an environmental impact statement nor gave blanket permission for clearcutting.

## II. NEPA Compliance

[2] An environmental impact statement is required for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c); *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F. 2d 421 (5 Cir. 1973); *Simmans v. Grant*, 370 F. Supp. 5 (S. D. Tex. 1974). This circuit has determined that an agency's initial determination whether to file a statement is to be tested under a rule of reasonableness. *Save Our Ten Acres v. Kreger*, 472 F. 2d 463, 465-66 (5 Cir. 1973). That rule of reasonableness does not apply, however, when there is a fundamental conflict of statutory purpose between NEPA and an agency's organic



statute. *Louisiana Power & Light Co. v. Federal Power Commission*, 557 F. 2d 1122 (5 Cir. 1977); *Atlanta Gas Light Co. v. Federal Power Commission*, 476 F. 2d 142, 150 (5 Cir. 1973).

Appellants first argue that the National Forest Management Act, as construed by the district court, directly conflicts with the NEPA and that in such a situation the latter must yield. The statutory conflict exception has been applied sparingly. *See generally*, Note, The Environmental Impact Statement Requirement in Agency Enforcement Adjudication, 91 Harv. L. Rev. 815, 825 (1978). The conflict between the agency's organic statute and NEPA must be both fundamental and irreconcilable. *Flint Ridge Development Co. v. Scenic Rivers Association*, 426 U.S. 776, 96 S. Ct. 2430, 49 L. Ed. 2d 205, reh. den. 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 159 (1976). In a limited number of cases statutorily mandated deadlines, *Gulf Oil Corp. v. Simon*, 373 F. Supp. 1102 (D.D.C.), *aff'd*, 502 F. 2d 1154 (Em. App. 1974), or an indispensable need for haste, *Atlanta Gas Light Co., supra*, have rendered compliance with NEPA impossible. In a small number of cases NEPA compliance has not been required when the agency's organic legislation mandated specific procedures for considering the environment that were "functional equivalents" of the impact statement process. *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 160 U.S. App. D.C. 123, 489 F. 2d 1247 (1973); *Portland Cement Association v. Ruckelshaus*, 158 U.S. App. D.C. 308, 486 F. 2d 375 (1973).

[3] We must, therefore, examine the NFMA to determine whether it falls within one of these narrow exceptions to NEPA. Section 1604(g) of the NFMA states that as soon as practicable, but not later than two years after October 22, 1976, the Secretary shall, in accordance with procedures set

forth in section 553 of title 5, promulgate regulations, under the principles of the Multiple-Use Sustained-Yield Act of 1960, that set out the process for the development and revision of the land management plans. The guidelines and standards prescribed by that subsection are to include specific procedures to ensure that land management plans are prepared in accordance with the NEPA of 1969 and must give direction on when and for what plans an environmental impact statement is required.

Later subsections of section 1604(g) mandate the composition of guidelines that will ensure consideration of the economic and environmental aspects of various systems of renewable resource management and that will ensure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an even-aged stands of timber will be used only when clearcutting has been determined to be the optimum method or other cuts have been determined to be appropriate, when an interdisciplinary review, as determined by the Secretary, has been completed and the potential environmental, biological, aesthetic, engineering and economic impacts on each potential timber sale have been assessed. 16 U.S.C. § 1604(g)(3)(F).

We do not think that the specific timetable laid down in section 1604(g) of the NFMA demonstrates a direct conflict between that statute and NEPA. In *Louisiana Power & Light Co. v. Federal Power Commission*, 557 F. 2d 1122 (5 Cir. 1977), the power and light company argued that the Commission was required to file an environmental impact statement before imposing a three-priority plan for natural gas curtailment. The Commission had ordered preparation of an EIS for the permanent curtailment plan, but had determined that an EIS for interim plans was not required. Statutorily the FPC was required to take "prompt action"



in determining which of the priority plans would be used. This court held that the Commission could not take the prompt action required by the statute and comply with the NEPA requirements. *Louisiana Power* establishes a rule that once it can be shown that the agency whose action is challenged can comply with NEPA and execute its statutory responsibility, the agency has a clear responsibility to examine the environmental implications of its action through the formal process that NEPA prescribes.

[4] The timetable in section 1604(g) established October 1978 as the deadline for the development of particular departmental procedures to ensure compliance with both NEPA and the Multiple-Use Sustained-Yield Act of 1960 and for developing comprehensive resource management plans. We are certain, however, that Congress did not intend entirely to exempt the Forest Service from NEPA compliance in establishing those new management guidelines. The legislative history of NFMA reveals as much. The Senate Report on the NFMA, commenting on the portion of the bill that later became section 1604 noted that the paragraph requiring assurance that plans for land management were to be developed in accordance with the NEPA did not alter the responsibilities of the Forest Service to comply with both NEPA and CEQ guidelines. Sen. Rep. No. 94-893, U.S. Code Congressional & Administrative News, 94th Cong., 2nd Sess. 1976 at pp. 6673-74. The Committee consideration of the bill stated that:

> In requiring the Secretary to promulgate regulations that set out the land management planning process, the bill specifically requires that he describe how the interdisciplinary approach will be used, the type of plans that will be prepared and their relationship to the Program, the procedures to insure public participation, and the procedures for coordinating the prepa-

> ration of land management to insure that they are prepared in accordance with the National Environmental Policy Act of 1969. The regulations are to be consistent with Council on Environmental Quality guidelines, providing direction for situations requiring preparation of an environmental impact statement. The provision referring to the National Environmental Policy Act is neither intended to enlarge nor diminish the Forest Service's responsibilities under the Act.

Thus the final guidelines, as developed by the Forest Service over the two-year period must comply with NEPA, and they may, in certain cases require production of an environmental impact statement.

[5] In the two-year interim, however, Congress contemplated that new environmental impact statements would be required only if interim guidelines required to be established within 120 days of the legislation's passage differed significantly from then current Forest Service guidelines. *Id.* at 6694. We interpret the congressional intent as one to forestall the necessity for an environmental impact statement solely because of the adoption of interim guidelines. Any change in Forest Service practice would have continued to require the preparation of an environmental impact statement. The agency action contemplated in this case, unlike that in *Louisiana Power & Light, supra,* or *Atlanta Gas Light Co., supra,* was expected to proceed over a substantial period of time. That factor alone would not necessarily be sufficient to demonstrate compatibility between NEPA and the challenged agency's organic statute. It is, however, a circumstance that we may consider. Taken with the substantial evidence, present in the legislative history, of congressional intent to harmonize the two statutory schemes, it impels us to conclude that compliance with the NFMA does not necessarily preclude NEPA compliance.



[6] We are also unpersuaded that the type of case before us today is one that must fall within the exception to NEPA compliance permitted when the agency's organic legislation mandates specific procedures for considering the environment that are the functional equivalent of an environmental impact statement. Those exceptions have generally been limited to environmental agencies themselves. See *Environmental Defense Fund, Inc. v. Environmental Protection Agency, supra.* Unlike an agency whose sole responsibility is to protect the environment, the Forest Service is charged with the management of the nation's timber resources. Its duties include both promotion of conservation of renewable timber resources and a duty to ensure that there is a sustained yield of those resources available. As the legislative history of the NFMA clearly points out, the Forest Service must balance environmental and economic needs in managing the nation's timber supply. The careful considerations mandated by section 1604(g) do not exempt the Forest Service from preparation of environmental impact statements.

[7, 8] We hold today that there is no irreconcilable conflict between the imposition of NFMA guidelines and NEPA compliance, The enactment of NFMA does not except the Forest Service from NEPA compliance when it develops permanent resource management guidelines. Nor is the Forest Service excepted in the interim period when the adopted interim management guidelines differ significantly from then current guidelines. Thus, clearcutting in the East Texas national forests under interim guidelines does not require an environmental impact statement, but the move toward implementation of a land management program under section 1602 of the NFMA may require such a statement.

## III. Clearcutting in the East Texas National Forests

[9, 10] Both the defendant-appellants and the intervenor-appellants argued that the district court had impermissibly substituted its judgment for that of Congress in determining that no further clearcutting should be permitted in the East Texas national forests until an environmental impact statement was filed. We agree. Unlike an agency decision to pursue action which has significant potential environmental effects, a congressional decision that such an action may proceed is not subject to judicial review. *Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army*, 492 F. 2d 1123, 1140 (5 Cir. 1974). The legislative history of the NFMA shows that Congress gave full attention to environmental and economic concerns inherent in managing the nation's renewable timber resources.[7] The congressional committee clearly recognized the significant impact of clearcutting in national forests:

> Clearcutting and other harvest systems aimed at creating even-aged stands result in sudden ecological change.

7. In addition to consideration of environmental and economic problems, Congress evidenced specific concern over what was apparently the district courts preliminary injunction order. Senator Humphrey noted the need for congressional action stating:

> Since the committees reported S. 3091, a district court judge in Texas has announced that, in addition to being in violation of the Organic Act, clear cutting, as practiced in the case before that court, was also in violation of the Multiple-Use Sustained-Yield Act.
>
> 122 Cong.Rec. S. 14496 (daily ed. Aug. 25, 1976). We assume that Senator Humphrey's reference was to the present litigation. We have found no other reported Texas cases and the parties have not directed our attention to other cases concerning Texas forests. The congressional debates, therefore, show not only general concern for the national forests of the entire country, but a specific congressional intention to permit clearcutting in the Texas forests.



> The impacts on esthetics and other forest values are perceived as being more immediately significant than those associated with uneven-aged management. Therefore, the Committee believes that special consideration is needed to assure proper use of these systems. This does not mean that other systems are not to be applied with equal care.
>
> The term "optimum method" means it must be the most favorable or conducive to reaching the specified goals of the management plan. This is, therefor, a broader concept than "silviculturally essential" or desirable" — terms considered and rejected by the Committee.
>
> The Committee had substantial discussion over how to define when it was appropriate to use even-aged management systems. There was full agreement that the decision should not be based solely on economic benefits, i.e., dollar benefits or dollar returns. Rather, the full scope of environmental effects (natural, economic and social) should be evaluated and even-aged systems should be used only when they best meet forest management objectives for the individual management plan. Further, the monitoring, evaluation and research processes will be used in the process.
>
> The size of clearcutting units had been a subject of wide public comment and Committee consideration. The Committee expects the Secretary to establish appropriate limits on size of units to be cut based on the best available scientific evidence, management plan goals, and the guides in this bill on overall decision making. The Committee expects the Secretary to write specific guidelines and hold the average size of clearcuts as low as practicable.
>
> The Committee also notes that in addition to size, such factors as the slope of cutting units, the proximity of units, one to another, the relationship of units to natural openings, and the effect on esthetics and other resource values must be considered.

> However, the Committee intends that cuts will be shaped and blended whenever possible.

Nevertheless the Senate-House conference agreed that the Forest Service should be permitted to continue clearcutting under the Church guidelines[8] pending development of management plans required by the NFMA. Senate-House Conference Committee Report, U.S. Code Congressional & Administrative News, 94th Cong., 2nd Sess. 1976 at p. 6726. That congressional determination precludes further inquiry by this court.

---

8. The Church guidelines are included in a sub-committee report on harvesting guidelines. They state:

> 2. *Harvesting limitations*
>
> Clear-cutting should not be used as a cutting method on Federal land areas where:
>
> a. Soil, slope or other watershed conditions are fragile and subject to major injury.
>
> b. There is no assurance that the area can be adequately restocked within five years after harvest.
>
> c. Aesthetic values outweigh other considerations.
>
> d. The method is preferred only because it will give the greatest dollar return or the greatest unit output.
>
> *3. Clear-cutting should be used only where:*
>
> a. It is determined to be silviculturally essential to accomplish the relevant forest management objectives.
>
> b. The size of clear-cut blocks, patches or strips are kept at the minimum necessary to accomplish silvicultural and other multiple-use forest management objectives.
>
> c. A multidisciplinary review has first been made of the potential environmental, biological, aesthetic, engineering and economic impacts on each sale area.
>
> d. Clear-cut blocks, patches or strips are, in all cases, shaped and blended as much as possible with the natural terrain.
>
> 4. *Timber sale contracts*
>
> Federal timber sale contracts should contain requirements to assure that all possible measures are taken to minimize or avoid adverse environmental impacts of timber harvesting, even if such measures result in lower net returns to the Treasury.



[11] We hold today that the congressional decision to permit clearcutting in national forests under the Church guidelines is not subject to judicial review during the period in which permanent guidelines are being established. This holding implicitly carries with it a rule that the decision is not subject to indirect review through the process of requiring an environmental impact statement before pursuing the congressionally determined course of interim action.

The Supreme Court has recently reminded lower federal courts that fundamental policy questions appropriately resolved in Congress and the state legislatures are not subject to re-examination in the federal courts under the guise of judicial review of agency action. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, ..... U.S. ....., 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). In this case that command is buttressed by the congressional action. The Church guidelines were incorporated into the National Forest Management Act. 16 U.S.C. § 1604(g). The decision was reached after the committees involved heard testimony that resulted in a record of over a thousand pages. Individuals testified on both sides of the clearcutting issue. That testimony emphasizes the extremely delicate balance struck by Congress in this matter. On the one hand, Congress faced an abundance of testimony that pervasive clearcutting was destructive of the scenic quality of the nation's forests and was damaging to the natural eco-system; on the other, representatives of the lumber and housing industry testified that abolition of clearcutting would have a drastic impact on the price of building material and the national housing shortage. The congressional response, embodied in the Church guidelines and the NFMA, was an attempt to salvage the territory between two extremes. It was also an effort to place the initial technical, management responsibility for the

application of NFMA guidelines on the responsible government agency, in this case the Forest Service. The NFMA is a set of outer boundaries within its parameters, the management decision belongs to the agency and should not be second-guessed by a court.

IV. The Programmatic Environment Impact Statement

[12] The district court held that an over-all or programmatic environmental impact statement was required. We think that conclusion was error under *Kleppe v. Sierra Club*, 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976). The Supreme Court rejected an argument that a federal agency involved in granting coal leases in the Northern Great Plains was required by section 102(2)(C) of the NEPA to file a regional "programmatic study". 96 S.Ct. at 2732. The Court noted the respondents' contentions that the environmental relationship of the whole area would be affected through the cumulative impact of successive projects. Nevertheless, the Court stated:

> Respondents' contentions [of environmental and geographical relationships] do not require that petitioners prepare one comprehensive impact statement covering all before proceedings to approve specific pending applications.
>
> • • • • •
>
> The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies. Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately.



That language applies equally in the case before us. Plaintiffs have failed to show arbitrary agency action in preparing individual impact statements for the relevant forests.

V. The Conroe Unit Impact Statement

[13] The district court also held that the environmental impact statement for the Conroe Unit of the Sam Houston National Forest was insufficient in a number of respects. It first noted that the impact statement discussed only clear-cutting as a method of sawlog harvesting and that it barely mentioned the selective harvesting principle. The impact statement contains a review of alternatives explored at the Charette[9] held on September 20-October 3, 1974. That Charette was one part of a public discussion of Forest Service management held throughout the East Texas area in connection with development of NFMA guidelines. Issue Number Seventeen at that Charlette involved the production of wood products. One of the three management alternatives produced for that issue was to practice highly modified forestry with the objective of producing high yields of recreation, wildlife and natural scenery with reduced timber yields. That option was not the ultimate management option

9. The term charette generally means the intense final effort made by architectural students to complete their solutions to a given architectural problem in an allotted time or the period in which such an effort is made. Webster's Third New International Dictionary (G. C. Merriam & Co. 1964). The Forest Service applied the term to its small group public discussions that were held as required by the NFMA. Representatives from conservation groups, the lumber industry and the general public were invited to participate in intensive discussions in an effort to develop a consensus of opinion on general forest management directions.

chosen by the Charette, but we think its substance was sufficiently close to the uneven-aged management concept to demonstrate that consideration was given to other silvicultural systems. There is no evidence in the record that the Charette were not conducted in good faith. The number of ecology-oriented participants was approximately equal to the twenty-eight or so participants who were identifiable as Forest Service connected. About seventeen were recognizable as lumber company representatives. No group who used the national forests appears to have been intentionally excluded. We think that the process used and the statement that it produced are sufficient to pass muster under NEPA.

## VI. Injunctive Relief

Because it perceived both outright violations of NEPA and inadequate compliance with NEPA, the district court enjoined further clearcutting in the national forests of Texas until the Forest Service field a programmatic environmental impact statement, which had been reviewed by the district court, with the Council on Environmental Quality. We think the relief granted was too broad. As we have said before, the Forest Service may not avoid the preparation and filing of an environmental impact statement as it develops new management guidelines pursuant to the NFMA. Congress, however, has determined that clearcutting may continue under restrictive guidelines until management practices are established under the NFMA. In overriding that decision the district court abused its discretion. It naturally follows that the grant of injunctive relief, an extraordinary remedy, was error. We hold today that the district court insofar as it purported to require a programmatic impact statement, held the Conroe statement insufficient or set out specific guidelines for future environmental impact statements. We hold



that the Forest Service is entitled to pursue clearcutting in the National Forests of Texas under the Church guidelines until the permanent guidelines under the NFMA are applicable. We also hold that the Forest Service must prepare environment impact statements as dictated by the NFMA and that it is responsible for the development of management guidelines that conform to the NFMA.

[14-16] We would emphasize that our decision today is not a wholesale license to clearcut in Texas forests. Both the Church guidelines and the NFMA express serious reservations about the practice that may not be disregarded by the Forest Service in developing permanent guidelines. The NFMA specifically notes that clearcutting may not be adopted simply because it gives the greatest dollar return per unit output. Rather clearcutting must be used only where it is essential to accomplish the relevant forest management objectives. The development of those management policies remains the province of the Forest Service, subject to the restrictions placed on it by Congress. A decision to pursue even-aged management as the over-all management plan under the NFMA is subject to the narrow arbitrary and capricious standard of review. The district court incorrectly determined that the decision was arbitrary and capricious. For that reason, as well as those stated above, the district court's injunction is ordered dissolved and the mandate in this case shall be issued forthwith. Rule 41 Fed.R.App.Pro.

REVERSED.

GOLDBERG, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I, IV, and V of the majority opinion without reservation. I also concur in so much of Parts II, III,

and VI of the majority opinion as hold that there is no irreconcilable conflict between NEPA and NFMA, that environmental impact statements (EIS's) must be prepared whenever interim management guidelines differ significantly from guidelines in effect at the date of passage of NFMA, that EIS's are required in connection with the development of permanent resource management guidelinee, and that the district court's prohibition of all clearcutting in the national forests of Texas pending compliance with NEPA must be reversed. My dispute with the majority is, therefore, narrow.

The majority holds that clearcutting in the East Texas national forests under the interim guidelines does not require an EIS so long as the clearcutting is conducted under the Church guidelines. The majority gives insufficient weight to NEPA's explicit command that "*to the fullest extent possible:* (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter . . . ." 42 U.S.C. § 4332. (Emphasis added.) Here, the Forest Service, the agency upon whose shouulders will rest any burden of preparing an EIS, has stated that it accepts the obligation to prepare EIS's during the interim period even when the forests continue to be managed under existing plans. The Forest Service asks only that it be permitted to



continue existing clearcutting programs while preparing an EIS in regard to them.[1]

Fidelity to NEPA's command that its policies be honored "to the fullest extent possible" compels me to conclude that interim management under existing plans requires an EIS. The congressional determination that clearcutting be permitted in the interim period where consistent with the Church guidelines only underlines the desirability of an EIS to assist in evaluating the compatibility of particular clearcutting programs with the Church guidelines. The EIS is the primary mechanism to insure that agencies have fully considered the environmental impacts of their decisions. This function is as essential with respect to interim management under existing plans as with respect to interim management under new plans.

I would permit clearcutting to proceed under existing plans while requiring the Forest Service to prepare expeditiously an EIS. This approach would honor the congressional determination in NFMA that clearcutting go forward and, at the same time, insure adequate assessment of management alternatives for tracts remaining after completion of the EIS. I, therefore, must respectfully dissent from this portion of the court's holding.

1. The brief for the federal appellants is clear on this point. Disclaiming any suggestion that NFMA granted the Forest Service unqualified permission to embark on significant new activities or projects without first filing an EIS, the Forest Service also conceded

> that when a national forest is being managed in accordance with existing land use plans which do not signicantly threaten the environmental "status quo," such continuing activities may be carried out pending completion of an EIS, providing that the Forest Service is moving expeditiously to complete the EIS within a reasonable time period . . . Further, as previously discussed, the Forest Service was committed to preparing EIS's on continuing management activities before this action was commenced and it remains committed to the goal of preparing and filing such EISs as expeditiously as possible.

### § 528. Development and administration of renewable surface resources for multiple use and sustained yield of products and services; Congressional declaration of policy and purpose

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to effect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

### § 529. Same; authorization; consideration to relative values of resources; areas of wilderness

The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528 to 531 of this title.

**§ 531. Same; definitions**

As used in sections 528 to 531 of this title, the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.

## NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

**§ 4331. Congressional declaration of national environmental policy**

**Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources**

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—



(1) fullfill the responsibilities of each generation as trustee of the environment for succeeding generations:

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

**§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts**

The Congress authorizes and directs that, to the fullest extent possible : (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and

social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

## CONSERVATION

## CHAPTER 36 — FOREST AND RANGELAND RENEWABLE RESOURCES PLANNING [NEW]

### § 1604. National Forest System land and resource management plans — Development, maintenance, and revision by Secretary of Agriculture as part of Program; coordination

(a) As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resources man-



agement plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

#### Criteria

(b) In the development and maintenance of land management plans for use on units of the National Forest System, the Secretary shall use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.

#### Incorporation of standards and guidelines by Secretary; time of completion; progress reports; existing management plans

(c) The Secretary shall begin to incorporate the standards and guidelines required by this section in plans for units of the National Forest System as soon as practicable after October 22, 1976, and shall attempt to complete such incorporation for all such units by no later than September 30, 1985. The Secretary shall report to the Congress on the progress of such incorporation in the annual report required by section 1606(c) of this title. Until such time as a unit of the National Forest System is managed under plans developed in accordance with this chapter, the management of such unit may continue under existing land and resource management plans.

#### Required assurances

(e) In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans —

(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accord-

ance with the Multiple-Use Sustained-Yield Act of 1960, and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

(2) determine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c)(1) of this section, the definition of the terms "multiple use" and "sustained yield" as provided in the Multiple-Use Sustained-Yield Act of 1960, and the availability of lands and their suitability for resource management.

**Required provisions**

(f) Plans developed in accordance with this section shall —

(1) form one integrated plan for each unit of the National Forest System, incorporating in one document or one set of documents, available to the public at convenient locations, all of the features required by this section;

(2) be embodied in appropriate written material, including maps and other descriptive documents, reflecting proposed and possible actions, including the planned timber sale program and the proportion of probable methods of timber harvest within the unit necessary to fulfill the plan;

(3) be prepared by an interdisciplinary team. Each team shall prepare its plan based on inventories of the applicable resources of the forest;

(4) be amended in any manner whatsoever after final adoption after public notice, and, if such amendment would result in a significant change in such plan, in



accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section; and

(5) be revised (A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years, and (B) in accordance with the provisions of subsections (e) and (f) of this section, and public involvement comparable to that required by subsection (d) of this section.

**Promulgation of regulations for development and revision of plans; environmental considerations; resource management guidelines; guidelines for land management plans**

(g) As soon as practicable, but not later than two years after October 22, 1976, the Secretary shall in accordance with the procedures set forth in section 553 of Title 5, promulgate regulations, under the principles of the Multiple-Use Sustained-Yield Act of 1960, that set out the process for the development and revision of the land management plans, and the guidelines and standards prescribed by this subsection. The regulations shall include, but not be limited to —

(1) specifying procedures to insure that land management plans are prepared in accordance with the National Environmental Policy Act of 1969, including, but not limited to, direction on when and for what plans an environmental impact statement required under section 4332(2)(C) of Title 42 shall be prepared;

(2) specifying guidelines which —

(A) require the identification of the suitability of lands for resource management;

(B) provide for obtaining inventory data on the various renewable resources, and soil and water, including pertinent maps, graphic material, and explanatory aids; and

(C) provide for methods to identify special conditions or situations involving hazards to the various resources and their relationship to alternative activities;

(3) specifying guidelines for land management plans developed to achieve the goals of the Program which —

(A) insure consideration of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish;

(B) provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, and within the multiple-use objectives of a land management plan adopted pursuant to this section, provide, where appropriate, to the degree practicable, for steps to be taken to preserve the diversity of tree species similar to that existing in the region controlled by the plan;

(C) insure research on and (based on continuous monitoring and assessment in the field) evaluation of the effects of each management system to the end that it will not produce substantial and permanent impairment of the productivity of the land;



(D) permit increases in harvest levels based on intensified management practices, such as reforestation, thinning, and tree improvement if (i) such practices justify increasing the harvests in accordance with the Multiple-Use Sustained-Yield Act of 1960, and (ii) such harvest levels are decreased at the end of each planning period if such practices cannot be successfully implemented or funds are not received to permit such practices to continue substantially as planned;

(E) insure that timber will be harvested from National Forest System lands only where —

(i) soil, slope, or other watershed conditions will not be irreversibly damaged;

(ii) there is assurance that such lands can be adequately restocked within five years after harvest;

(iii) protection is provided for streams, streambanks, shorelines, lakes, wetlands, and other bodies of water from detrimental changes in water temperatures, blockages of water courses, and deposits of sediment, where harvests are likely to seriously and adversely affect water conditions or fish habitat; and

(iv) the harvesting system to be used is not selected primarily because it will give the greatest dollar return or the greatest unit output of timber; and

(F) insure that clearcutting, seed tree cutting, shelter-wood cutting, and other cuts designed to regenerate an even-aged stand of timber will be used as a cutting method on National Forest System lands only where —

(i) for clearcutting, it is determined to be the optimum method, and for other such cuts it is determined to be appropriate, to meet the objectives and requirements of the relevant land management plan;

(ii) the interdisciplinary review as determined by the Secretary has been completed and the potential environmental, biological, esthetic, engineering, and economic impacts on each advertised sale area have been assessed, as well as the consistency of the sale with the multiple use of the general area;

(iii) cut blocks, patches, or strips are shaped and blended to the extent practicable with the natural terrain;

(iv) there are established according to geographic areas, forest types, or other suitable classifications the maximum size limits for areas to be cut in one harvest operation, including provision to exceed the established limits after appropriate public notice and review by the responsible Forest Service officer one level above the Forest Service officer who normally would approve the harvest proposal: *Provided*, That such limits shall not apply to the size of areas harvested as a



result of natural catastrophic conditions such as fire, insect and disease attack, or windstorm; and

(v) such cuts are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource.

**Appendix D**

**In the**

**UNITED STATES COURT OF APPEALS**

**For the Ninth Circuit**

**No. 71-2514**

**O R D E R**

SIERRA CLUB, et al.,
*Plaintiffs-Appellants,*

*vs.*

EARL L. BUTZ, et al.,
*Defendants-Appellees.*

FILED: March 16, 1973
Dennis R. Matthews, Clerk
U. S. Court of Appeals

Before: MERRILL, DUNIWAY and TRASK,
Circuit Judges

Plaintiffs-appellants have moved this court to remand the cause to the District Court of the District of Alaska to enable the filing of a motion for new trial upon the ground of newly discovered evidence.[1]

The evidence to which reference is made is a report by A. Starker Leopold and Reginald H. Barrett to U.S. Plywood-Champion Papers, Inc., respecting the manner in which the sales contract should be carried out with due consideration given to social values other than the economic

1. *(Page 1)* Since more than a year has elapsed since rendition of judgment by the District Court, the motion properly is made to this court under 28 U.S.C. § 2106 rather than to the District Court under Rule 60(b), Fed. R.Civ.P.

yield of pulp or lumber. It was the view of this team of experts that "the basic precepts on which the original timber sale contract were based are not today acceptable." It recommended "that the company explore with the Forest Service the possibility of revising the cutting plan to provide more adequate protection for the wide spectrum of ecologic values that is characteristic of Southeastern Alaska." Two alternative cutting plans were proposed and the report recommended renegotiation of the contract to provide for reduced cutting.

The report thus primarily addresses itself to matters of administrative judgment: whether cutting plans should be modified and the contract renegotiated.

In our judgment, however, it may bear as well on one of the issues presented by this case: whether the contract violated the terms of the Multiple Use-Sustained Yield Act, 61 U.S.C. § § 528-531 (Supp. 1970.[2] This issue was considered by the District Court in its opinion in this case, 325 F.Supp. 99, 122-24 (D.Alas. 1971). The question it discussed whether the Forest Service had given "due" consideration to the various purposes (other than timber) for which the national forests are to be administereed under the Act.[3] The court, at 325 F.Supp. 123 n. 48, discussed what should be regarded as "due" consideration under the Act and concluded that what was intended was that the Forest Service should "apply their expertise to the problem after

2. *(Page 2)* 16 U.S.C. § 528 states that "[I]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes * * *."

3. *(Page 2)* 16 U.S.C. § 529 states that "[I]n the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas * * *."



consideration of all relevant values." It concluded that "some" consideration was sufficient. (For the purposes of this order we accept this interpretation, with the caution that "due consideration" to us requires that the values in question be informerly and rationally taken into balance. The requirement can hardly be satisfied by a showing of knowledge of the consequences and a decision to ignore them.)

Referring to the proof introduced by the plaintiffs "due consideration," the court stated, at 325 F.Supp. 123-24:

> "* * * it utterly fails to impeach the record provided by the Forest Service by showing that the administrative decision makers either lacked actual knowledge or failed to consider the myriad reports and studies available to them. The court must presume, therefore, that the Forest Service did give due consideration to the various values specified in the Multiple Use-Sustained Yield Act. Having investigated the framework in which the decision was made, the court is forbidden to go further and substitute its decision in a discretionary matter for that of the Secretary."

In our judgment the report tendered upon this motion may be found to bear upon the stated issues: Whether the Forest Service in truth had knowledge of the ecological consequences of the contract and cutting plan to which it agreed; whether in reaching its decision it failed to consider the available material (the report appends a 10-page list of material cited in the report in existence at the time the contract was entered into); further, a relevant question may be whether consideration was given to alternatives (such as those recommended by the report), which, while giving prime consideration to timber values, would still afford protection to the other values to which due consideration must be given.

The District Court also held the claim of violation of the Multiple Use-Sustained Yield Act barred by failure to exhaust administrative remedies, 325 F.Supp. at 115-17, and laches, *id.* at 127. The question is now presented whether such defense can appropriately be employed to exclude consideration of the new material.

Laches involves a balancing of equities. Since plaintiffs are not asserting a private grievance but a public one *(see Arlington Coalition of Transportation v. Volpe,* 458 F.2d 1323, 1329 (4th Cir. 1972)); since from the tendered report, the public concern would appear to be of the most substantial dimensions; since plaintiffs have acted promptly in bringing before the court new material which may for the first time provide a sufficient basis for a claim of violation; and since there may be a question whether administrative review of such new material in any event is available, a re-examination by the District Court of its earlier ruling in this respect in light of the tendered new material would seem appropriate.

We conclude that the motion should be granted. We intimate no view as to the manner of disposition of such motion or the extent to which hearing should be granted. We hold only that what is here at stake is of such import as to call for the consideration of the District Court.

Leave is granted to plaintiffs-appellants, within thirty days, to file in the District Court their motion for a new trial upon the ground of newly discovered evidence. The case is remanded to the District Court in order that such motion may be entertained, and with direction in due course to certify to this court its disposition of such motion. The order of this court that the case stand submitted is hereby vacated.

Supreme Court, U.S.
FILED
OCT 25 1978
MICHAEL RODAK, JR., CLERK

No. 78-485

# In the Supreme Court of the United States

OCTOBER TERM, 1978

TEXAS COMMITTEE ON NATURAL RESOURCES,
PETITIONER

*v.*

BOB BERGLAND, SECRETARY OF AGRICULTURE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1978

---

No. 78-485

TEXAS COMMITTEE ON NATURAL RESOURCES,
PETITIONER

*v.*

BOB BERGLAND, SECRETARY OF AGRICULTURE, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

---

The petition for a writ of certiorari was filed out of time. The judgment of the court of appeals was entered on May 8, 1978 (Pet. 2). The petition for rehearing was denied on June 22, 1978 (Pet. 2). The time for filing a petition for a writ of certiorari was not extended, and, accordingly, the 90-day period provided in 28 U.S.C. 2101(c) expired on September 20, 1978. The petition was filed on September 21, 1978.

The time limit imposed by 28 U.S.C. 2101(c) is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 417-418 (1923).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

OCTOBER 1978

DOJ-1978-10

Supreme Court, U. S.
FILED
NOV 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM 1978

**No. 78-485**

TEXAS COMMITTEE ON NATURAL RESOURCES,
*Petitioner,*

v.

BOB BERGLAND, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL.,
*Respondents.*

## REPLY TO MEMORANDUM FOR THE RESPONDENT

HARVEY L. DAVIS
Attorney at Law
3315 Daniels Avenue
Dallas, Texas 75275

IN THE

# Supreme Court of the United States

OCTOBER TERM 1978

---

**No. 78-485**

---

TEXAS COMMITTEE ON NATURAL RESOURCES,
*Petitioner,*

*v.*

BOB BERGLAND, SECRETARY OF AGRICULTURE
OF THE UNITED STATES, ET AL.,
*Respondents.*

---

## REPLY TO MEMORANDUM FOR THE RESPONDENT

Time limitation for filing the petition for writ of certiorari is not jurisdictional. *Durham v. U.S.* 401 U.S. 481, (1971); *Taglianetti v. U.S.*, 394 U.S. 316 (1969).

Petitioner mailed this petition at the Post Office, Dallas, first-class, airmail, insured on the morning of September 16, only 86 days after the overruling of petition for rehearing in the Court of Appeals, as attested by the attached photocopy of Receipt No. 925652 (Exhibit No. 1).

Under Rule 25, Federal Rules of Appellate Procedure, the mailing would have constituted timely filing. Although the

Supreme Court has no such mailing rule, petitioner requests the Court, in its discretion, to accept the timely mailing as a filing of the petition.

The one-day delay by the Postal Service does not seem to interfere with the "just and speedy determination" of this action. On the other hand, the denial of this petition on account of this one-day lateness would deny the "just" and "inexpensive determination" of an extremely important issue. (See Rule 1, Federal Rules of Civil Procedure).

The Respondent has cited only one case: *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 417-418 (1923). In that case, the decree of the Court of Appeals had been entered in October, 1921, and the Supreme Court, on January 9, 1922, had denied a petition for writ of certiorari. On May 22, 1922, a second petition for writ of certiorari was filed. This is an entirely different situation from the instant case.

Moreover, the statute then applicable has been changed considerably through the years since then, including the addition of a provision for extension of not exceeding sixty days by a Justice of the Supreme Court. Since the petition in the instant case was docketed only one day late, we must turn next to the rules. Rule 22(1), (2) and (3) Supreme Court, uses the language, "shall be deemed in time." The verb, "deem", involves the exercise of reasoning by the Supreme Court, rather than jurisdictional deadline.

Similarly, Rule 25(a), Federal Rules of Appellate Procedure, uses this language"

> ". . . except that briefs and appendices *shall be deemed filed* on the day of mailing is the most expeditious form of delivery by mail, excepting special delivery, is utilized." (emphasis supplied).



The use of this language in the Rule, which is based on 28 U.S.C. 2101, demonstrates a recognition that the Court should and does have to determine exceptions to deadlines in applying for review of lower court decisions.

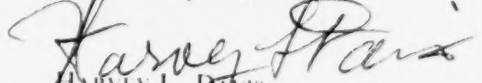
28 U.S.C. 2101(c) uses the phrase ". . . shall be taken or applied for. . . ." This language also leaves discretion in the Court as to the method by which a petition shall be deemed to be applied for. The Supreme Court can deem this petition filed when mailed, just as the Courts of Appeals can and do.

Rule 34(2) of the Supreme Court addresses the situation of a party requesting a time extension before the regular deadline expires. Petitioner had no reason to use this rule. Petitioner in good faith believed mailing the petition four days prior to the 90 day period afforded ample time for the petition to be timely filed. Personally carrying the Petition from Dallas to Washington did not appear logical, would have been costly as well as an additional consumption of the energy resources of this Nation.

The Supreme Court rules do not address the instant situation where a petition was mailed in advance but was not delivered within the normal time. In the instant situation, Petitioner requests the Court, and each Justice therein, either to deem the petition as timely, or to accept it although not timely, or to grant a one-day extension so that it will be deemed timely.

Respondents have delayed for more than a month, their raising the question of timely filing of the Petition. It would appear any rights they may have had to raise the question have been waived.

Respectfully submitted,



HARVEY L. DAVIS
Attorney at Law
3315 Daniels Avenue
Dallas, Texas 75275

925652

**RECEIPT FOR INSURED MAIL**
**DOMESTIC—INTERNATIONAL**

ADDRESSED FOR DELIVERY AT
(Post Office, State and Country)

Washington DC.
20543

| | | |
|---|---|---|
| POSTAGE | AIR ☒ | $ 10.90 |
| INSURANCE COVERAGE | | FEE |
| $ 400 cc | | $ 2.75 |
| SPEC. HANDLING | | ¢ |
| DOMESTIC ONLY — SPECIAL DELIVERY | | $ |
| DOMESTIC ONLY — RESTRICTED DELIVERY | | ¢ |
| RETURN RECEIPT (Except to Canada) | | 45¢ |
| FRAGILE ☐ LIQUID ☐ PERISHABLE ☐ | TOTAL | $14.10 |
| (POSTMARK) SEP 15 1978 USCO | CUSTOMER OVER ▶ | |
| | POSTMASTER By KJ | |

PS Form 3811, Apr. 1977 — RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
   - ☑ Show to whom and date delivered.....¢
   - ☐ Show to whom, date, and address of delivery.....¢
   - ☐ RESTRICTED DELIVERY
     Show to whom and date delivered.....¢
   - ☐ RESTRICTED DELIVERY.
     Show to whom, date, and address of delivery.....$
   (CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO:

3. ARTICLE DESCRIPTION:

| REGISTERED NO. | CERTIFIED NO. | INSURED NO. |
|---|---|---|
| | | 925652 |

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent
M C Colvin

4. DATE OF DELIVERY — POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: — CLERK'S INITIALS

RECEIVED
SEP 21 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

EXHIBIT I